FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR POWER AUTHORITY OF THE STATE OF NEW YORK

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October 16, 1959.

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Opinion Below

The opinion of the Court of Appeals on November 14, 1958 (R. 422) is reported at 265 F. 2d 338. This opinion was rendered at the time of interlocutory holdings by which it remanded the case to the Federal Power Commission and retained jurisdiction. There was no opinion at time of final judgment of March 24, 1959 rendered subsequent to the Commission's report of its hearings, opinion and findings on remand (265 F. 2d 344).

Jurisdiction

The jurisdiction of this Court rests on Section 313(b) of the Federal Power Act and 28 U. S. C. § 1254(1). The order and judgment of the Court of Appeals was entered on March 24, 1959 (R. 532-533), 265 F. 2d 344. The petition for certiorari was filed on May 13, 1959 and granted June 22, 1959. A petition for certiorari was likewise granted on June 22, 1959 in the companion case No. 63, *Federal Power Commission* v. *Tuscarora Indian Nation*, and the two cases were consolidated (R. 533-534).

Constitutional Provisions, Treaties, Statutes and Orders Involved

The case involves:

1. United States Constitution, Article I, § 8, and Article IV, § 3.

2. Treaty between the United States and Canada concerning uses of the waters of the Niagara River (1950), 1 U. S. T. 694.

3. Niagara Redevelopment Act (Public Law 85-159, 71 Stat. 401, 16 U. S. C. §§ 836, 836a).

4. Federal Power Act (49 Stat. 838, 16 U. S. C. § 791a et seq.), §§ 3(1), 3(2), 4(e), 10(a), 10(e), 21, 23(b), 24, 313(b).

5. Act of June 30, 1834, 25 U. S. C. § 177, 4 Stat. 730.

6. Act of September 13, 1950, 25 U. S. C. § 233, 64 Stat. 845.

The most pertinent parts are set forth in Appendix A of this brief.

Questions Presented

The questions presented arise out of the following circumstances:

Congress directed the Federal Power Commission to issue petitioner a license for a power project with capacity to utilize all the water of the Niagara River available to the United States under international agreement (Niagara Redevelopment Act, Public Law 85-159, 71 Stat. 401, 16 U. S. C. §§ 836, 836a). The Federal Power Commission issued such a license. The license included a storage reservoir of 60,000 acre foot capacity, the capacity represented to Congress and found by the Commission to be necessary for full utilization of available water. The reservoir as licensed and necessary transmission lines and roads around it would occupy 1,383 acres of respondent's 6,249-acre reservation.

The order and judgment appealed from provides that "the license * * * is approved except insofar as it would authorize the condemnation of Tuscarora Indian tribal land for reservoir purposes" and directs the Federal Power Commission "to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes" on the ground—stated therein—that the Commission failed to make the finding required by § 4(e) of the Federal Power Act in the case of reservations of the United States that the license would not interfere or be inconsistent with the purpose for which respondent's reservation was created or acquired.

The questions are:

1. Does respondent's land needed for the Niagara Project constitute part of a "reservation of the United States" within the meaning of § 4(e) of the Federal Power Act—even though: (i) it was not reserved to respondent or otherwise established by any treaty, executive order or statute of the United States, but on the contrary was acquired

in fee simple by purchase from non-governmental, non-Indian private owners; (ii) the United States does not have and never has had any property interest in it; (iii) no statute authorizes any department of the United States Government to exercise supervision of it; and (iv) possession and use of virtually all the land is not in the Tribe but rather in individual members to whom it has been allotted under State law?

2. Assuming arguendo, however, that respondent's land needed for the project in order for it to have capacity to utilize all the water of the Niagara River available to the United States under international agreement does constitute a part of "a reservation of the United States" within the meaning of § 4(e), was the requirement of § 4(e) "that licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" superseded by the Niagara Redevelopment Act which specifically directed the Commission to issue a license to petitioner for a project capable of using all the Niagara water available to the United States?

3. Should respondent have been allowed to relitigate in the District of Columbia Circuit Court of Appeals issues determined by the Court of Appeals for the Second Circuit in an action (i) brought by respondent in a forum of its own choice prior to institution of review proceedings in the District of Columbia Circuit and (ii) progressed to judgment in a Second Circuit District Court before the District of Columbia Court of Appeals obtained jurisdiction through the filing by the Federal Power Commission of a transcript of its proceedings?

4. Did the District of Columbia Circuit Court of Appeals usurp congressional and administrative authority in directing the Commission without further administrative proceedings to amend its licensing order to exclude the power of petitioner to condemn respondent's land for reservoir purposes?

STATEMENT

I

The Licensing of the Niagara Power Project

The Niagara Power Project now being constructed by petitioner, Power Authority of the State of New York, resulted from (i) the 1950 treaty between the United States and Canada (1 U. S. T. 694) which allows each country to divert greater amounts of water from the Niagara River for power purposes than previously allowed by international agreement and (ii) the Niagara Redevelopment Act (Public Law 85-159; 71 Stat. 401; 16 U. S. C. §§ 836, 836-a) which directed the Federal Power Commission to issue a license to the Power Authority for a project "with capacity to utilize all of the United States' share of water of the Niagara River permitted to be used by international agreement."

The Niagara power project will be the largest hydroelectric project in the United States (*Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 888). When completed in 1963 at a cost of about $720,000,000 it will produce an average of 13 billion kilowatt hours of electricity a year. It is designed to have a firm capacity of 1,800,000 kilowatts and a total capacity of 2,190,000 kilowatts (R. 226, 278, 440, 460, Exh. 191, E. R. 40, R. 120, Exh. 218, E. R. 132, R. 248).*

The project will consist of an intake structure at the edge of the Niagara River about three miles above the Falls; a waterway consisting of twin covered conduits extending from the intake about four miles through the City of Niagara Falls and the Town of Niagara to a forebay and

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* Citations to the printed record are designated "R."; to the separately bound exhibit volume "E. R."; to the original record "O. R."

pump-generator plant in the Town of Lewiston; a storage reservoir adjacent to the pump generator plant with a capacity of 60,000 acre feet (if part of respondent's land can be acquired for the project); an open waterway approximately 250 feet wide extending from the pump generator plant forebay to the forebay of the main generating plant, which is on the edge of the river about five miles below the falls (R. 392, 401-2, 416).

A storage reservoir of at least 60,000 acre feet is essential to make practical use of all the water available and to keep part of it from going to waste. The project was designed so that the bulk of its energy output would be produced for a 17-hour period, five days a week when power is most needed and most valuable. This requires that during the night time and on weekends the bulk of the water be pumped into the reservoir for use during the 17-hour peaking periods. The 1,800,000 kilowatt firm power capacity which the project is designed to have and which Congress understood it would have, is a capacity to produce 1,800,000 kilowatts 17 hours a day, 5 days a week (R. 224-231, 461; Exh. 218, E. R. 132, R. 248; H. Rep. 862, 85th Cong. 1st Sess. p. 7, 104 Cong. Rec. 14,444). A factor which makes the reservoir completely essential under any power-marketing scheme is that the 1950 Treaty makes more water available for power (50,000 cubic feet per second for division between the United States and Canada) at night than in the day during a tourist season of 7 months so that in that season more water will go over the Falls in the daytime for scenic purposes (1 U. S. T. 694, 697).

The first power from the project is scheduled to be produced in February 1961 (R. 277). The project is being built in the shortest possible time in order to alleviate the critical shortage of power on the Niagara frontier caused by the destruction in 1956 of the Niagara Mohawk Power Corporation's Schoellkopf station which for many years had used a good part of the Niagara River water and supplied low-cost power to the electrochemical and electrometallurgical industries upon which the economy of the area

was based. The disaster created a power emergency on the Niagara frontier which was recognized by both Houses of Congress when the Niagara Redevelopment Act was passed (R. 278-279; S. Rep. 539, 85th Cong. 1st Sess.; H. Rep. 862, 85th Cong. 1st Sess.).

The Senate's consent to ratification of the 1950 treaty was conditioned upon a reservation providing that no project to develop the United States' share of the additional water could be undertaken "until it be specifically authorized by Act of Congress" (1 U. S. T. 694, 699). Accordingly, beginning in 1950 bills were introduced in each Congress variously calling for development by the Power Authority, by private utility companies and by the Federal government. No bill had been passed up to June 6, 1956 when a rock slide virtually destroyed the Schoellkopf generating plant. (Exh. 248, F. R. 131)

In August 1956 petitioner, a public corporation established by New York law to develop the St. Lawrence and Niagara Rivers for power, applied to the Federal Power Commission pursuant to § 4(e) of the Federal Power Act for a Niagara license, contending that the reservation to the 1950 treaty was invalid because it did not involve a subject of international concern and that, therefore, specific enabling legislation was not necessary. The Commission dismissed the application, but on appeal the United States Court of Appeals for the District of Columbia Circuit set aside the dismissal, reinstated the application and remanded the case to the Federal Power Commission. *Power Authority of the State of New York* v. *Federal Power Commission*, 247 F. 2d 538 (D. C. Cir. 1957).

Obviously spurred on by that decision and by the power emergency facing the Niagara frontier, in August, 1957 Congress passed the Niagara Development Act (Public Law 85-159; 71 Stat. 401; 16 U. S. C. §§ 836, 836-a) directing the Federal Power Commission to issue a license to the Power Authority for a project to use all water of the Niagara River available to the United States for power,

including the water made available for the first time by the 1950 treaty and water used by Niagara Mohawk under prior international arrangements.

The Power Authority promptly amended its application to the Federal Power Commission to bring it under the new law and in September the Commission issued it a license but deferred making decisions on objections to the type of waterway and size and location of the storage reservoir interposed by local municipalities (R. 393-394). It held hearings on these objections. While the hearings were in progress the Tuscarora Indians also objected to the location of the reservoir (R. 393-395).

The storage reservoir, the size and location of which was shown on material submitted to Congress and to the Commission, required some Tuscarora land. The Tuscarora claimed that treaties barred the taking of any of their land. Members of the Tuscarora Nation testified at the Federal Power Commission's hearings. The Nation intervened formally in the proceeding and filed a brief through counsel (R. 393-395; 419; Exh. 212, E. R. 118).

While the hearings on the objections were pending, this Court vacated as moot the judgment of the Court of Appeals for the District of Columbia Circuit which had reinstated the application for a Niagara license which the Power Authority had made pursuant to §4(e) of the Federal Power Act prior to the passage of the Niagara Redevelopment Act. This Court took this action despite the fact that the Power Authority pointed out that the license already issued was based upon the original application as amended to conform with the 1957 act (*American Public Power Association, et al.* v. *Power Authority of the State of New York*, 355 U. S. 64).

On January 30, 1958, the Commission issued the Authority a superseding license and approved a storage reservoir of the size and capacity proposed by the Authority in its representations to Congress and in drawings submitted to the Commission (R. 391 *et seq.*).

The Commission's January 30 order directed that some changes be made in the waterway proposed in the Authority's application. The Commission refused to order any changes in the reservoir and expressly declined to decide the question of whether the Power Authority could condemn Tuscarora land. It said "* * * we do not attempt to pass on that question since other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive" (R. 395). (The Commission had taken no evidence with respect to the availability of alternate lands.)

The Commission did not approve Exhibit J to the Authority's license application, which showed both the waterway and the storage reservoir. That Exhibit J showed a reservoir of the size and location represented to Congress (Exh. 18, E. R. 11; Exh. 191, E. R. 35-44). It included approximately 1,300 acres of Tuscarora land (*id.*). The Commission's order directed the Authority to file for approval by July 1, 1958 a revised Exhibit J which would show the waterway as the order directed it to be built and also show the reservoir (R. 404, 409).

On February 28 the Tuscarora applied for rehearing on the January 30 order and for the first time argued that § 177 of Title 25 U. S. Code forbade the use of their land for project purposes and also argued for the first time that the license was invalid as to their land because the Commission had not made a finding required by § 4(e) of the Federal Power Act in connection with the licensing of projects on "reservations of the United States" that the license would not interfere or be inconsistent with the purpose for which the reservation was created or required. They asked that the license be amended to exclude their land (R. 412-414).

The Commission denied the application for a rehearing on March 21, 1958 and in doing so held that Tuscarora land (in which, unlike lands in the west, the United States has no property interest, R. 339, 366) did not constitute a

reservation of the United States within the meaning of § 4(e). It held that "the best location of the reservoir" required Tuscarora land and that the Authority's right to condemn the land was for a court to decide (R. 412-413).

On May 5 the Commission approved a revised Exhibit J submitted by the Authority (R. 418). It showed that the reservoir would be located in such a way as to take in 1,383 acres of Tuscarora land—somewhat more than on the previous Exhibit J which had been before the Commission when it held its hearings and issued its January 30 order (R. 416). (The new reservoir plan was based on surveys of the area adjoining the reservation which the Authority had not made at the time of the January 30 order.)* All the Tuscarora land shown on the new Exhibit J was owned by the Nation in fee as a result of purchase from non-Indian non-governmental owners and almost all of it was allotted under State law and tribal custom to individual members of the Nation. *Tuscarora Nation of Indians* v. *Williams*, 79 Misc. 445; N. Y. Indian Law, § 95 (R. 339, 366, 370-376).

II

History of the Litigation

Meanwhile, all its efforts to negotiate with the Tuscarora for the purchase of their land having failed, the Authority in April undertook to acquire these 1,383 acres of land by eminent domain (R. 110-119; Exh. 181, E. R. 25, R. 115). It acted under § 21 of the Federal Power Act which authorizes a licensee to acquire land needed for a power project by eminent domain in the State or Federal courts and under Section 1007 of the New York Public Authorities Law and Section 30 of the New York High-

* Petitioner was not permitted to survey respondent's land until late July, 1958.

way Law. The procedure followed involved taking land in the name of the State through the State Superintendent of Public Works' filing a map in the office of the Clerk of Niagara County, who is also the Clerk of the Niagara County Court and the Supreme Court of Niagara County. Under the State law title passes upon the filing of a map, but to obtain possession against the consent of the owner, subsequent court proceedings are necessary (in which the validity of the taking may be challenged) and damages (unless agreed upon) are determined by the State Court of Claims. This method of exercising eminent domain is called appropriation.

The Tuscarora thereupon brought an action in the United States District Court for the Southern District of New York (1) *permanently* to enjoin petitioner from "taking any actions" to acquire by appropriation lands belonging to the Tuscarora, or from entering upon such lands; (2) for a declaratory judgment that petitioner had no right, authority or power to acquire *"by appropriation or otherwise"* any lands belonging to the Tuscarora; and (3) for an order setting aside and vacating all descriptions, maps, notices and other instruments "in connection with the purported appropriation" of Tuscarora's property.

On June 24, 1958 the United States District Court for the Western District of New York (to which the action had been transferred as a local action) dismissed the complaint on the merits (*Tuscarora Nation* v. *Power Authority*, 164 F. Supp. 107 mod. 257 F. 2d 885, reh. den. 257 F. 2d 895, cert. den. 358 U. S. 841 (1958), reh. den. 360 U. S. 923 (1959)).

While the action for an injunction and declaratory judgment was pending in a Second Circuit District Court, the Tuscarora on May 16 petitioned the Court of Appeals for the District of Columbia Circuit to review the January 30 order of the Federal Power Commission. They waited 56 of the 60 days allowed by law to file a petition and then elected to do so in the District of Columbia Circuit rather than in the Second Circuit in a district of which litigation

brought by them and involving the same issues was pending.*

The Authority intervened as a party in the review proceeding.

On June 25—the day after judgment against the Tuscarora was entered by the District Court in the Second Circuit action—the Commission certified and filed with the District of Columbia Court of Appeals a transcript of the record upon which its January 30 order was based.

On July 24 the United States Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court in so far as it held that the Power Authority has the right to exercise eminent domain over Tuscarora land pursuant to § 21 of the Federal Power Act and entered a declaratory judgment to that effect. It held that Congress through the 1957 Niagara Redevelopment Act had consented to the use of Tuscarora land for the project. However, it held that New York State's exercise of an inherent sovereign power of eminent domain over Indian land—something it had been doing with judicial approbation since 1775—was repugnant to 25 U. S. C. §§ 177 and 233 and that therefore the Authority's right to take the land was based solely on the 1957 Act and the Federal Power Act. With Judge Swan dissenting, the Court set aside the documents used by the State to exercise eminent domain over the land on the ground that the procedure used did not conform to § 21 of the Federal Power Act which provides for the exercise of eminent domain in Federal or State courts.

The Court of Appeals requested the District Court in the event a condemnation proceeding was started there to expedite proceedings as much as possible (*Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885).

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* They took no steps to obtain a review of the May 5 order which by its terms was to become final unless objected to within 30 days and which was the only order of the Commission which included their lands among those licensed for the project and thus the only order which actually aggrieved them. See R. 418.

The Authority immediately started such an action in the United States District Court for the Western District of New York.

The Tuscarora petitioned the Second Circuit Court of Appeals for rehearing, contending for the first time that only the District of Columbia Circuit had jurisdiction to settle the basic dispute between the parties. They made this contention despite the fact that three days after filing their review petition in the District of Columbia Circuit, they had submitted a memorandum to the District Court in New York sustaining that Court's jurisdiction to decide those issues. In their brief in the Second Circuit Court of Appeals Tuscarora argued that their land could not be taken unless a finding was made pursuant to §.4(e) of the Federal Power Act and that in the absence of such finding the license was void as to their land. They asked the Second Circuit Court to reverse itself and if it refused to do so to hold up all proceedings pending decision by the District of Columbia Circuit in the review proceeding. The Second Circuit denied the applications and cancelled a stay which had precluded the Authority from entering upon Tuscarora land except for the purpose of making surveys. It also refused to grant a stay pending application for a writ of certiorari. (*Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 895).

The New York State Superintendent of Public Works, who was a defendant in the Second Circuit action, appealed to this Court from so much of the judgment of the Court of Appeals as denied the State's inherent power to acquire Tuscarora land by eminent domain and as held that appropriation was not a proper method of exercising eminent domain pursuant to § 21 of the Federal Power Act. That appeal is pending. (Oct. 1959 Term, No. 4).

The Tuscarora sought a stay of the Court of Appeals mandate from Mr. Justice Harlan pending decision on petition for certiorari. On September 8 Mr. Justice Harlan denied a stay of the mandate but in effect stayed condem-

nation proceedings in the District Court except with respect to land immediately necessary for the building of transmission lines. (*Tuscarora Nation of Indians* v. *Power Authority*, 3 L. Ed. 2d 40).

On September 15 the District Court for the Western District of New York, Burke, J., granted the Power Authority immediate possession of approximately 85.6 acres of Tuscarora land for the purpose of erecting the transmission lines.

On October 13, 1958 this Court denied a Tuscarora petition for certiorari to the Second Circuit Court of Appeals. On the same day this Court also denied the Tuscarora request for a stay of all proceedings in the District Court for the Western District of New York pending a decision by the Court of Appeals for the District of Columbia Circuit on its review of the order of the Federal Power Commission. As a result of this Court's October 13 decision the stay granted by Mr. Justice Harlan by its terms came to an end. (*Tuscarora Nation of Indians* v. *Power Authority*, 358 U. S. 841)

On October 29 the Western New York District Court granted the Authority possession of all the remainder of the Tuscarora land needed for the Niagara Project except for areas within 200 feet of dwellings. The September 15 and October 29 orders were conditioned upon deposits in Court of a total of $2,000,000. (R. 284-287).

The Authority proceeded to carry on construction work on Tuscarora land. It built high voltage transmission lines to replace existing lines which had to be taken down in another part of the project and were urgently needed. These new lines have been in use since early 1959 (R. 277). The Authority also proceeded to divert creeks, dig drainage ditches and do other work preliminary to the building of dikes. It did not disturb any dwellings or land around them. (R. 277; Exh. 224, O. R. 8251; Exh. 225, O. R. 8252; Exh. 226, O. R. 8253).

On November 14 the court below rendered a decision holding that Congressional consent was necessary for the use of Tuscarora land for the project, that the 1957 Niagara Redevelopment Act did not contain such consent, that the Federal Power Act did contain such consent but that it was conditioned upon the Commission's making a finding pursuant to §4(e) that the license would not interfere or be inconsistent with the purpose for which the reservation was created or acquired. It remanded the case to the Commission to explore the possibility of making such a finding and directed it to report to the court. The court retained jurisdiction (R. 422-432).

Beginning November 24 the Commission held exhaustive hearings pursuant to the Court's remand. The evidence presented included testimony concerning the circumstances under which the Tuscarora reservation was established, the relationship of the United States to the reservation both at the time it was established and subsequently, the nature of the ownership of the Tuscarora land needed for the project, the number of Tuscarora and other Indians now living on the reservation, the number of white people now living illegally on the reservation, the amount of reservation land actually being used, the purposes for which it is being used, the methods by which the residents of the reservation who work earn their livings, the relationship of New York State to the reservation and the fact that it rather than the United States supplied the residents with education, health services and welfare benefits, and the failure of the United States to exercise supervision over the reservation (*infra*, pp. 18-32).

The Commission also received evidence concerning the practical need of Tuscarora land for the Niagara Project, the impossibility of building a reservoir of the size required without using reservation land, and the legislative history of the 1957 Niagara Redevelopment Act (*infra*, pp. 33-42).

On February 2, 1959, the Commission made a finding that the use of 1,383 acres of Tuscarora land would interfere and be inconsistent with the purpose for which the reserva-

tion was created or acquired. This holding was directly contrary to the recommendations of the Commission's staff (R. 445-447). Two Commissioners vigorously dissented (R. 486-494).

The Commission unanimously reaffirmed its January 30, 1958 holding that a reservoir of the capacity proposed by the Authority—60,000 acre feet—is required to utilize all of the Niagara water available to the United States under international agreement as required by the 1957 Niagara Redevelopment Act. It found without dissent that it would be impractical to build a reservoir of that size without the use of Tuscarora land and that removing the reservoir from those lands and reducing its size from 60,000 acre feet to 30,000 acre feet would result in a loss of about 300,000 kilowatts, a reduction of about one-sixth in the total dependable capacity of the project (R. 486-494).

On February 25 the Commission—again by a 3 to 2 vote—denied the Authority's application for rehearing. The majority refused a request contained in the rehearing application that it consider whether or not the use of a smaller amount of land than 1,383 acres would interfere or be inconsistent with the purpose for which the reservation was established. The majority held that a formal application for an amendment of the license was necessary before it could do so (R. 495-512).

The Commission reported its findings to the District of Columbia Court of Appeals and joined the Authority in petitioning the Court for reconsideration of its November 14 interlocutory holding.

The United States, through the Department of Justice, petitioned the Court of Appeals for leave to participate in the review proceeding as amicus curiae, for leave to file a motion that the Court reconsider its November 14 interim holding, and for oral argument on the motion.

On March 24, 1959 the Court granted the United States leave to participate as amicus curiae but denied the motions

of the United States, the Federal Power Commission and the Power Authority for reconsideration (R. 531).

Also on March 24 the Court entered the order and judgment under review approving the license "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes". It remanded the case to the Commission "with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes". It stated in the order that the ground upon which it was made was the failure of the Commission to make a finding under § 4(e) of the Federal Power Act. It made no mention of transmission lines (R. 532-533).

Petitions for certiorari to the Court of Appeals for the District of Columbia Circuit were filed by the Solicitor General of the United States on May 12 and by the Power Authority on May 13. On May 21 the Tuscarora Nation of Indians submitted (i) a motion for leave to file a petition for rehearing on this Court's denial of its petition for certiorari to the Court of Appeals for the Second Circuit in the declaratory judgment action; (ii) a petition for such rehearing in which it asked this Court to grant certiorari to the Second Circuit in the event that it granted certiorari to the District of Columbia Circuit; and (iii) a motion to substitute John Burch McMorran, the new Superintendent of Public Works of the State of New York for his predecessor, John W. Johnson, in the Superintendent's appeal from part of the Second Circuit judgment. (The Attorney General of the State of New York had made a similar motion to substitute McMorran for Johnson on April 29, 1959.) On June 22 this Court granted both petitions for certiorari to the Court of Appeals for the District of Columbia Circuit and granted the motion to substitute McMorran for Johnson. It denied the Tuscarora motion for leave to file a petition for rehearing with respect to denial of certiorari to the Second Circuit (*Tuscarora Nation of Indians* v. *Power Authority* 360 U. S. 923).

Immediately after the Commission made its February 2 finding, the Authority ceased operations on the reservation except for some final work on the transmission lines and some cleaning up. It is now engaged in building the reservoir up to the Tuscarora line. In the event that this Court decides Tuscarora land may be taken, it will extend the reservoir on to Tuscarora land. In the event that this Court decides Tuscarora land may not be taken, the Authority will have to close in the reservoir along the border line. This would reduce the capacity of the reservoir and the power capacity of the project.

III

Origin and History of the Tuscarora Reservation

The Tuscarora Reservation consists of approximately ten square miles (6,249 acres) on the outskirts of the City of Niagara Falls, New York, a city of about 100,000 people. It is in the largely urban part of the Town of Lewiston adjoining the city. It is between two and three miles east of the point on the Niagara River where the Authority's main generating plant is being built. This plant is about 5 miles downstream from the Falls (see map in the centerfold of this brief and Exh. 190, E. R. 33; Exh. 191, E. R. 42-43).

The Reservation consists of three parts designated as Parcels A, B and C on the centerfold map. The land needed for the Niagara Power Project is the shaded part of Parcel C.

The Tuscarora migrated from North Carolina to Central New York State before the Revolution and lived there many years with the Oneida, who held sway in that area, approximately 200 miles east of their present reservation in Niagara County. The Tuscarora had no territory of their own. Their relationship to the Oneida has been

variously described as "tenants at will or by sufferance" and "guests" (Exh. 233, Hough, *Census of the State of New York*, (1857), p. 510; Exh. 241, E. R. 220; N. Y. Sen Doc. No. 24, 1846, p. 68).

They were, however, accepted as members of the Five Nations which then became known as the Six Nations. The others in addition to the Oneida were the Mohawks, the Onondaga, the Cayuga and the Seneca.

The Seneca occupied a vast area in Western New York, including all of what is now Niagara County except a four mile strip on the west parallel to the Niagara River which they ceded to the King of England at two treaties held in 1764 (London Documents, Vol. XXXVII, p. 621; *id.* p. 652).

A few Tuscarora fought with the Seneca on the side of the British and after they were defeated at the Battle of Elmira in 1779 went to the neighborhood of Fort Niagara which the British held until 1796. There they were under the protection of and received rations from the British (R. 343-348; Exh. 241, 242, E. R. 220, 221).

There came a time, perhaps as early as the 1780's, when a few Tuscarora settled on the square-mile area shown as Parcel A on the centerfold map (Exh. 239, E. R. 217). This is located about 6 miles south-east of Fort Niagara. Historical accounts differ as to the time of the settlement and there are no contemporary documents which fix it. The most that can be said with certainty is that they were there prior to 1797. The Tuscarora had the same kind of tenure there with the Seneca as their kinsmen had with the Oneida in Central New York. They were described by one of their own chiefs as "squatters upon the territory of another distinct nation" (Exh. 233, *loc. cit*).

The United States in the 1784 Treaty of Fort Stanwix (7 Stat. 15) and the unratified 1789 Treaty of Fort Harmar (7 Stat. 33), both with the Six Nations, specifically promised to hold the Oneida and the Tuscarora secure in the lands upon which they then lived which were in Central New York. By the same treaties the United States promised

to secure to the Six Nations a tract of land in Western New York, east of a line parallel to and approximately 4 miles east of the Niagara River and running its full length from Lake Erie to Lake Ontario as shown on the centerfold map. All the land west of that line (the northern half of which had been ceded by the Six Nations to the King in April 1764*) was acknowledged to be under United States as distinguished from Indian Control. As the map shows, Parcel A was west of the line and hence no possible Indian claim to it was protected by the 1784 and 1789 treaties. (R. 342-347).

The 1794 Treaty of Canandaigua (7 Stat. 44) between the United States and the Six Nations superseded the prior treaties and specifically recognized that the Seneca Indians and only the Seneca Indians had possessory rights to the Western New York area. The 1794 Treaty brought a change in the boundary between the United States and the Indians by restoring the April 1764 boundary line. Under that Treaty with the King and now under the 1794 Treaty with the United States, the westward line of the Seneca's possessions was acknowledged to be the Niagara River for about half the distance from Lake Erie northerly toward Lake Ontario. Along the northern half of the River beginning at the point where Gill Creek runs into it a line was drawn to a point on Lake Ontario about 4 miles east of Fort Niagara and this line constituted the westward boundary in the area. As a result of the 1794 Treaty all the land within the present Tuscarora Reservation, including Parcel A, was secured to the Seneca. There is some confusion in the Treaty as to the exact location of the line. The location most favorable to the Seneca is shown on the centerfold map. (R. 347-351; Lon. Doc. XXXVII, 621, 652).

Under the 1786 Hartford Compact between New York and Massachusetts, New York was recognized to have sovereignty and Massachusetts to own the underlying fee and

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* A second treaty between the King and the Seneca, concluded in August 1764 appears not to have applied to any of the land involved in this litigation (London Doc. XXXVII, p. 652).

the right to buy out the Seneca's interest with respect to their territory, except for a strip one mile wide along the Niagara River. All rights which had been derived from the King to this strip along the whole length of the River between Lake Erie and Lake Ontario were conceded to be in New York. All of the islands on the United States side of the international boundary, both in the southern and northern halfs of the River were acknowledged to belong to New York (R. 315-317).

By 1794 Massachusetts had sold the fee and preemptive rights in the westerly part of its land including that which was in what is now Niagara County to Robert Morris who in turn had sold it to the Holland Land Company with the understanding that he would buy out the Seneca's rights on its behalf. At Big Tree in 1797 Morris, with the approbation of the United States, purchased the Seneca's property rights in the area except for certain clearly denominated parts which were reserved to the Seneca. None of the present Tuscarora Reservation was so reserved. As a result of the 1797 transaction, unencumbered fee title in the land on which it is located passed to the Holland Land Company (R. 311-320, 338, 349-351).

In 1798 it was brought to the attention of the Holland Land Company that a group of Tuscarora was squatting on some of the land to which the Company had obtained title. The Company noted that the Tuscarora had been "forgotten at the Treaty of Big Tree" and decided it would be just and a matter of good policy to allow them to continue to live on the square mile known as Parcel A. By this time, however, the original group had been increased by others who had come from Central New York and they had spilled over onto Parcel B*. The Company decided to allow them to have a

* There is no definite proof as to when they came but two events undoubtedly contributed to it. One was the British giving up Fort Niagara in 1796. The other was the sale by the Oneida in 1795 of a large part of the remaining land on which they and the Tuscarora lived in Central New York (N. Y. Assem. Doc. No. 51, 1889, pp. 244-247).

second square mile—the northern half of Parcel B—but upon a petition from the Tuscarora, finally allowed them to have a total of three square miles. This included all of Parcel A and Parcel B. There was no formal conveyance, but there was a definite understanding that the underlying fee and the right of preemption would remain in the Company (Exhs. 232A-232E, E. R. 165-170; R. 319-324).

By deed dated March 30, 1808 the Seneca Indians purported to deed a square mile of land to the Tuscarora "in consideration of love and affection." The property so intended to be conveyed was not described except that it was "in their actual possession now being" (Exh. 232 V, E. R. 201-202). Having sold the land in 1797 the Seneca had no title to convey in 1808 (R. 324-325).

The United States had no part in these transactions. The original two parcels of the Tuscarora Reservation were created for or acquired by the Tuscarora through the unilateral action of the Holland Land Company. Of course, the fact that the Seneca had originally allowed the Tuscarora to sojourn on Parcel A as "squatters" (Exh. 233, *loc. cit.*) may be said to have a part in the overall situation. However, the United States had nothing to do with it whatever.

As stated above none of the land in Parcel A or Parcel B is involved in this proceeding. Only a part of Parcel C is involved; and the history of that parcel now follows.

In 1801 the Tuscarora learned that North Carolina had enacted legislation protecting their rights of occupancy to some land which the tribe had formerly held in North Carolina and upon which a few members were still residing. The Tuscarora asked the President of the United States to assist them in selling the North Carolina land and in buying with the proceeds some other land "in the neighborhood of our present residence" (Exh. 232F, E. R. 171). Henry Dearborn, then Secretary of War, assisted them in the sale of their North Carolina land and in the purchase of

Parcel C from the Holland Land Company. He appointed William R. Davie to help the Tuscarora in their North Carolina negotiations and commissioned him "to give the consent and sanction of the United States, so far as the same may be necessary". Agreement was reached by the Indians for the sale of the North Carolina land for $15,000. Thereupon Dearborn by direct negotiations with the Holland Land Company and by negotiations carried on through Erastus Granger, the War Department's Indian Agent in Western New York, arranged for the purchase of Parcel C from the Company for $13,752.83. Dearborn took a deed to the property from the Company in his own name and in turn granted it a purchase money mortgage. The deed recited that the conveyance was to Dearborn in trust for the Tuscarora. It was not a true trust however because by its terms he engaged to reconvey the property to the Tuscarora or to whomsoever they should designate whenever they so directed (Exhs. 232F-232S, E. R. 171-195; R. 304-307).

The reason the original deed went to Dearborn is clear. The Company was not to be paid the full purchase price at once and a mortgage was to be given to secure payment of the balance. The Company insisted that the conveyance be to a white man who could give a valid mortgage rather than to an Indian tribe which could not. While Dearborn engaged to convey the land to the Indians or their designees whenever they asked him to do so, all he could do while the mortgage was still in force was to convey it subject to a common law mortgage. Thus the Company was protected until full payment was made (Exh. 232O, E. R. 185-186).

It took longer than anticipated to collect for the North Carolina land but full payment was finally made through a series of installments the last of which was received in 1809. Prior to the time that arrangements had been completed for the sale of the North Carolina land and the purchase of the new land the Tuscarora had asked Dearborn to arrange to have the proceeds of the North Carolina sale

deposited in the Bank of the United States and kept there on their behalf until they could purchase the new land. However, as payments were received they were sent direct to Joseph Ellicott, the Holland Land Company's agent in Batavia, New York, and each payment was endorsed upon the mortgage. The money never came into the possession of the United States (R. 304-305; 310-311, 336, 340).

Finally in 1809 when Parcel C was fully paid for, Dearborn executed a deed of it to the Tuscarora Indian Nation. The deed contained a personal warranty on his part to the Tuscarora. In communicating the fact that he had executed the deed, he advised the Nation to petition the New York State legislature to hold the land "in a national capacity" (R. 304-306; Exh. 232T, 232U, E. R. 196-200).

There was no Act of Congress involved in any part of the transactions involving Parcel C except the general statute (1 Stat. 49) which established the Department of War and prescribed that the Secretary of the Department should have such duties as were assigned to him by the President in connection with waging war and dealing with Indians.

Parcels A and B were never taxed by New York or its subdivisions while in the possession of the Tuscarora but Parcel C was continuously taxed from the time the Holland Land Company acquired full title to it until 1821 (Exh. 232W, E. R. 203). In that year the New York Legislature as the result of a petition from the Tuscarora enacted legislation making it tax-free (Chap. 146 Laws 1821, Exh. 232X, E. R. 204). Thus it was as a result of the action of the State of New York that the land was treated as a tax-free Indian reservation.*

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* In 1867 the Supreme Court of the United States in the case of *New York Indians*, 5 Wall. 761, declared that an Indian reservation which had been set apart and protected by a treaty of the United States to be exempt from state taxes. The Court held that to allow a state to tax such land would be a violation of a promise made by the United States to the Indians in the treaty. Of course, no treaty protects any of the Tuscarora land.

As Assistant Attorney General Willis Van Devanter, quoting from *New York Indians* v. *The United States*, 30 Ct. Cls. 413, said in a 1900 opinion (Exh. 250, E. R. 236, O. R. 7424) with respect to the Tuscarora Reservation, the United States "had no property rights in the plaintiff's New York lands and acquired none."

IV

Nature of the Interest in and Ownership of the Land Constituting the Tuscarora Reservation and Present Use of the Land

When the Tuscarora acquired Parcel C they had but recently abandoned a nomadic state and were learning the white man's way of tilling the soil. The Nation soon began to divide specific parts of the land permanently among its members. The members owned the houses and used the land allotted to them for their own purposes to the exclusion of all others. None of the Tuscarora land has ever been subject to allotment by the Federal Government under 25 U. S. C. § 331 *et seq.* (24 Stat. 388 as amended) because no part of the Reservation was established by treaty, Act of Congress or Executive Order. It could not be allotted by the Federal Government for the further reason that the Federal Government did not own the underlying fee (Exh. 250, E. R. 238).*

* Although the Alleghany, Cattaraugus and Tonawanda reservations of the Seneca were established by treaty, Congress recognized its inability to allot Seneca land by specifically exempting it from the Allotment Act. 25 U. S. C. 339, 24 State. 391.

However, in 1854, Chapter 175 of the New York Laws of that year gave legislative validation to the allotment of Tuscarora land by the Nation.*

The process of allotting Tuscarora land has been carried out to such an extent that the only land left in strictly tribal ownership consists of a swamp of 350 acres, a wood lot, the land underneath the only building owned in common by the tribe (the gymnasium) and a national farm consisting of 29 acres (R. 55-56, 69, 198-199, 204). This farm was once allotted to a man who acted as treasurer of the tribe. He surrendered it back to make up for some tribal funds which he had embezzled (Exh. 235, E. R. 207).

Of the 1383 acres of Parcel C needed for the Niagara Project only 45 acres of swamp land—in a corner of the proposed reservoir—is unallotted tribal land (R. 472, O. R. 7395-7396).

Allotted land is treated as the individual property of the allottee just as property owned in fee simple outside the reservation is treated by its owners. The Nation is in the same position, for instance, as the State of New York in that property reverts to it only in the case of escheat for lack of heirs. The allottees buy and sell property and upon death it is transferred by will or intestacy.

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* The statute is now Section 95 of the New York State Indian Law and reads as follows:

§ 95. *Allotment of lands*

"The chiefs or head men of the Tuscarora nation of Indians in the county of Niagara, in council, shall allot and set apart for any Indian or Indian family, making application and not possessing land, so much of the tribal lands as they shall deem reasonable and just; and no tribal lands shall be appropriated by any Indian to his own use, without such consent and allotment. Such chiefs, in council, may appoint a clerk, who shall enter in a book kept for that purpose, every allotment of tribal lands, set apart for any Indian or Indian family, and of the part thereof from which such Indian or family may sell timber and trees, and of the part he is permitted to clear for the purposes of cultivation."

The sole limitation is that it can be sold or descend only to members of the Nation (R. 52-57, 370-376). In addition to buying and selling the property the allottees rent it to other members of the tribe and for some time a considerable amount of it has been rented to non-Indians (R. 53, 69-71, 131-139, 223, Exh. 168, O. R. 7756). As a result a substantial amount of all the area used for agricultural purposes in the Reservation is now farmed by white men under leases from allottees (Exh. 168, O. R. 7756). The allottees receive the full rental payment and the Nation receives nothing. Allottees retain ownership of allotted land even though they have moved permanently from the Reservation (R. 196, 198-199). Allottees have built houses and other buildings on the allotted land and the Nation has absolutely no interest in them and receives no income from them. They are owned and controlled by the allottees just like buildings on non-reservation land (R. 370-376).

From the beginning, control of the property has been pursuant to State law. No Federal statutes have applied to it except the Indian Non-intercourse Acts, the last of which is now 25 U. S. C. § 177 (4 Stat. 730) and 25 U. S. C. § 233 which was enacted in 1950. Disputes over ownerships are settled pursuant to State law in the State Courts*.

The extent of the interest of the allottees compared to the interest of the Nation in Tuscarora land was demonstrated in 1958 when the Niagara Mohawk Power Corporation procured a transmission line right-of-way over a portion of the reservation by agreement with the Nation and the allottees and with the approval of the Niagara County Court and the State Public Service Commission (R. 62-63, 78-80, 85, 87-88, 91). The Company paid $3,000.00 for the Nation's interest and $13,200.00 for the allottees' interest

* Examples of such disputes are to be found in the following cases: *Peters* v. *Tallchief*, 121 App. Div. 309; *Matter of Printup*, 121 App. Div. 322; *Tuscarora Nation* v. *Williams*, 70 Misc. 445; *Mt. Pleasant* v. *Gansworth*, 150 Misc. 584 aff'd 242 App. Div. 675; *Mt. Pleasant* v. *Patterson*, 276 App. Div. 819. See R. 57.

(N. Y. Pub. Serv. Doc. No. 18,879—1958). One allottee, Chief Patterson, alone received $3,300.00 (R. 78).

Similarly, when New York State has taken Indian land by eminent domain the State Court of Claims has awarded far more money to the allottees for their interests than to the Nation for its interest (*Dixon* v. *State*, 4 Misc. 2d 76 (1956); Exh. 230).

There were about 300 Tuscarora on the reservation in 1801 (Exh. 232-F. E. R. 171). There are now 397 (Exh. 210, E. R. 73-110). An additional 168 persons are enrolled as Tuscarora but live off the reservation (*id.*). Two hundred and eighty-eight Indians who are not Tuscarora live on the reservation (R. 198).* Two hundred and twenty-one non-Indians live on the reservation exclusive of those who live in trailers (R. 177, 189, 191). There are 180 trailers on the reservation (R. 160-162), only one of which is inhabited by an Indian (R. 191). While originally the residents of the reservation maintained themselves by farming (R. 324, 337-338; Exhs. 232-D, 232-E, 232-P, 233, 235 E. R. 168, 170, 187, 205) the bulk of them who work now do so off the reservation in factories or on construction work (Exh. 210, E. R. 73-110). Only a small percentage of the reservation is now used for farming (R. 477-479; Exhs. 207, 227, E. R. 57, O. R. 8277). Only 17% of the land was tilled last year (*id.*). The percentage of reservation land used for farming has decreased much more **rapidly than the percentage of total land used for farming in Niagara County and New York State. While farm produce has increased in New York State despite the use of less land, farm production on the reservation has decreased** steadily and heavily (Exh. 207, E. R. 47).

There is only one full-time farm operation on the land needed for the power project (R. 80). Chief Patterson and one of his six sons farm 630 acres of which they own 170

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* There is no evidence in the record with respect to the amount of Indian-blood any of the persons acknowledged to be Tuscarora or non-Tuscarora Indians possess.

and rent 460 from others. Of the 630 acres 577 are within the 1383 acres needed for the reservoir (R. 75-77).

On the part of the reservation not needed for the power project seven white farmers operate 640 acres under leases from individual Indians (Exhs. 168, 227, O. R. 7756, 8277; R. 131-139, 223-224). One white farmer operates the national farm on lease from the Nation (R. 131-133).

There are 180 houses on the reservation, of which 37 are in the part needed for the reservoir (R. 159, 72). Of the 37, about half are shacks and about half are fairly adequate dwellings. (R. 159; Exh. 203, O. R. 4546.)

It would be difficult to determine what property rights the Nation as such continues to have in Parcels A and B where the underlying fee is owned by the assignees of the Holland Land Company and the Tuscarora have only right of occupancy. However, with respect to Parcel C the property interests are clear. The Nation is still the holder of the record title. Nevertheless, the individual allottees own complete property rights which are indefeasible except that they are not transferable to non-members of the Nation. What common land is left within the Tuscarora Reservation is treated similarly to the common or tribal land in the Federally created reservations whereas the allotted land within the Tuscarora Reservation is in most essential respects similar to the allotted non-tribal land in Federal reservations, which is specifically subject to condemnation under 25 U. S. C. § 357 (31 Stat. 1084).

V

Supervision of the Tuscarora Reservation

The Congress undoubtedly has legislative power under the Commerce Clause to provide for the exercise of Federal supervision over the Tuscarora Reservation. It has not done so and the Federal government has never exercised such supervision.* Chapter 1 of Title 25 established the Bureau of Indian Affairs with general authority to deal with Indians but no statute of the United States gives it supervisory power over the Tuscarora Reservation.**

The only dealings the Federal Government has with the members of the Tuscarora Nation involve the annual distribution of cloth under Article 6 of the 1794 Treaty of Canandaigua. This cloth is distributed by the Department of Interior to Indians who are descended from members of the Six Nations regardless of whether they live on reservations are not (R. 195-197).

The United States, however, has not only failed to enact any legislation giving the Department of Interior or any other Department of the United States Government super-

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* The one possible exception involves the 7 Major Crimes Act (23 Stat. 385) which the New York Court of Appeals held in *People ex rel Cusick* v. *Daly*, 212 N. Y. 183 (1914) to give exclusive jurisdiction to the Federal Courts over seven major crimes when committed by Indians on the reservation. This holding was overruled in 1948 by the passage of Section 232 of Title 25. (62 Stat. 1224).

** In connection with Federal reservations where the United States owns the underlying fee there are government officials with the title of Superintendent who actually superintend such reservations. (25 U. S. C. §§ 25, 33; 38 Stat. 598, 80; see also Act of July 27, 1868, 15 Stat. 228; Act of June 4, 1924, 43 Stat. 376, with reference to the lands of the Eastern Cherokee, cited in *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417, 421-422 (4th Cir. 1938)); Act of June 7, 1924, 43 Stat. 636, with reference to Pueblo Indian lands.

intendence over the Tuscarora Reservation, but has failed to give authority to any department to approve any actions of the Nation with respect to its lands (Exh. 250-253, E. R. 234-241).

Under §§ 13, 271-309a, 452-454, and 562 of Title 25 the United States Government has provided schools, health services and other social services to Indian Reservations in the West but has never throughout its history provided any such for the Tuscarora Reservation. (R. 174, 166, 172).

Conversely, the State of New York has always provided education, health and public welfare benefits to the Tuscarora without Federal participation.

The extent to which the State has interested itself in its Indian Reservations is evidenced by the fact that from 1931 through 1947 it expended $4,621,177 on education for which neither the Indians nor the Federal Government contributed anything, and $2,497,271 for public welfare relief and other benefits for which neither the Indians nor the Federal Government contributed anything (Rep. J. Leg. Com. on Indian Affairs, N. Y., 1948 p. 14).

In the case of schooling the State pays the whole cost of schools and teachers on the Tuscarora Reservation, and pays for the attendance of Indian students at nearby high-schools (R. 174).

The State provides the services of a physician and nurse on the reservation completely at its own expense (R. 164-169).

In the case of public welfare the Indians get the same benefits as others except that the cost is borne completely by the State instead of being shared by the State and the local community (R. 169-172, 232-235).

Throughout the history of Indian reservations in New York State, with the exceptions noted herein, whatever supervision was exercised has been by the State of New York and no Department of the Federal Government has ever

held tl . it was the Department under which the supervision of the Tuscarora Reservation fell.

The Department of Interior has not even had an Indian agent* in New York since 1949 and prior to that time his main function was superintending the leasing of land in the Alleghany and Cattaraugus reservations.** The only other duties he is known to have performed were in connection with the annual allotment of cloth under the 1794 treaty of Canandaigua and payments to some Indians—not including the Tuscarora—under other treaties (R. 361, 368-369).

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* In 1954 Congress by Joint Resolution 108 (83rd Cong. 1st Sess.) declared that Federal supervision over Indians in New York and several other states should be terminated at the earliest possible time and that thereupon the Indian agents in those states should be withdrawn. The Resolution requested the Secretary of Interior to recommend legislation to accomplish these purposes. The Department drafted proposed legislation dealing with New York State and submitted it to Congress. In doing so it pointed out that its Indian agent had already been withdrawn from New York in 1949. The Department pointed out that the New York Indians would oppose the proposed legislation and that they were definitely against capitalization of the annuities paid them annually under treaties. The Department strongly implied that the legislation was not necessary. The Congress took no action with respect to it. (Exh. 255, E. R. 243, R. 358-370)

** The Congress, at the request of New York State, enacted statutes in 1875 and 1890 validating existing leases in the Alleghany and Cattaraugus Reservations of the Seneca and authorizing future leases there (18 Stat. 330; 26 Stat. 558). See note, p. 63, *infra*.

VI

Legislative History of the 1957 Niagara Redevelopment Act

As a result of the Schoellkopf disaster in June 1956, the Power Authority developed plans to utilize all the water of the Niagara River available to the United States by enlarging the scope of the project as previously planned and increasing the size of the project features. In January, 1957 it published a brochure (Exh. 191, E. R. 35-44) which described the new project and contained maps showing an enlarged reservoir located in part on Tuscarora land. Although ownership of the various parcels needed for the project was not stated, roads were indicated and thus the maps showed unequivocally that the reservoir took in what is Tuscarora land. (Exh. 191, E. R. 42-43, Exh. 192, E. R. 45, R. 387-388).

The fact that Tuscarora land was included in the plans was an open and notorious one. Maps and other material from the brochure were printed in the Niagara Falls newspaper. Copies were sent to the Tuscarora together with advice that some of their land was needed. With the aid of the brochure the Authority attempted in January, February and March, 1957 to negotiate with the Tuscarora for the taking of their land (R. 111-113; Exh. 191, 192, 193, E. R. 41-46).

In April, 1957 the Senate Public Works Committee held hearings leading to the passage of the Niagara Redevelopment Act which mandated the Federal Power Commission to issue a license to the Power Authority. The Authority's brochure (Exh. 191) was introduced into evidence at the hearing and was examined by each member of the Public Works Committee (R. 263-264, 384-385).

The testimony and this exhibit showed: (a) that the project then being discussed and now known as Project

2216 would have an installed capacity of 2,190,000 kw, (Item IV, p. 71)* a dependable capacity of 1,800,000 kw, (*id.* pp. 71, 76, 82) a total energy output of 13,000,000 kwh, (*id.* p. 15) and a dependable energy output of 10,700,000 kwh (Exh. 191, E. R. 40); (b) that the industries in the area were suffering badly from the fact they no longer had for their use the cheap power formerly produced by the Schoellkopf plant which had brought the electrometallurgical and electrochemical industries to Niagara (Item IV, pp. 15, 33-34, 70, 156, 179-180, 221-224, 229-231, 234, 356-357); (c) that in order to stay in the area industry needed to be able to buy power for a maximum of 4.5 mills (*id.* pp. 72, 225, 356); (d) that the project as planned by the Power Authority would produce power for about 4 mills (*id.* pp. 26, 75, 187, 349, 355-356); (e) that in order to do this a reservoir was necessary (*id.* pp. 71, 172; Item II, pp. 6, 7; Item III, p. 5); (f) that the reservoir would be built in open country (Exh. 191, p. 43); and (g) that the reservoir was on the outskirts of the City of Niagara Falls (Exh. 191, 42-43, 45). As above stated, Exhibit 191 showed the actual location of the reservoir including Tuscarora land, although it was not labeled as such on the exhibit. The only "open country" upon which the reservoir could possibly be built includes Tuscarora land (R. 267-268). The Committee was told that the project would be built according to sound engineering principles and was advised that these should be passed on by the Federal Power Commission (Item III, p. 69).

On June 27, 1957, the Senate Public Works Committee reported out the bill which became Public Law 85-159 (Niagara Redevelopment Act).

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* The following public document items were offered in evidence at the hearings before the Commission and transmitted as part of the record:

Item I. Sen. Doc. 113, 84th Cong., 2d Sess. (O. R. 4946).

Item II. H. Rep. 862, 85th Cong., 1st Sess. (O. R. 5010).

Item III. S. Rep. 539, 85th Cong., 1st Sess. (O. R. 5021).

Item IV. Hearings before Subcommittee of the Senate Committee on Public Works on S. 512 and S. 1037, 85th Cong., 1st Sess. (O. R. 5034).

The House Public Works Committee did not hold public hearings on any Niagara bills in 1957 but on July 23, 1957 it reported out a bill identical to the one drafted by and reported out by the Senate Committee* (H. Rep. No. 862, 85th Cong. 1st Sess., pp. 3-4). Prior thereto the House Committee was furnished with copies of Exhibit 191 (Exh. 223).

The House Committee Report stated (p. 3) that further hearings in 1957 were unnecessary because extensive hearings on Niagara legislation had been held in previous sessions of the Congress. The report specifically referred to hearings held by the House Committee on Public Works in the 2nd Sess. of 81st Cong., 1st Sess. of 82, 83 and 84 Cong. It also referred to joint hearings held by the Senate and House Committees in the 1st Sess. of the 83rd Cong. and by the Senate Committee in the 1st Sess. of the 82nd and 83rd Cong. and the 2nd Sess. of the 83rd Cong., both sessions of the 84th and the hearing held by it in the 85th. Thus the 1957 report was based on all testimony previously adduced.

No witnesses appeared on behalf of any Indian tribe at the hearings on Niagara legislation in 1957, although the Tuscarora had been informed that part of their land would be needed for the project. (Exhs. 191, 192, 193, E. R. 35-46.) However, New York Indians were represented at two hearings on Niagara legislation in 1951. (Hearings before House Committee on Public Works, September 19-21, 1951, Public Document No. 82-8, pp. 163-169; Hearings before Senate Committee on Public Works, August 21-22, 1951 on S. 517, S. 1963 and S. 2021, pp. 182-188).

At those hearings a witness on behalf of the Seneca claimed they are the owners of a strip of land a mile wide along the Niagara River from Lake Erie to Lake Ontario

* As stated above, the 1957 report of the House Public Works Committee (Item II) in connection with the bill which became Public Law 85-159 referred to these hearings as well as to hearings held in subsequent years.

within which the main power plant, surge basin, intake structures and part of the waterway must necessarily be located. (See centerfold map. Rights to this strip and to the islands in the river claimed by Massachusetts were ceded to New York in the Hartford Compromise of 1786. See pp. 20-21, *supra.*) The witness also claimed the Seneca owned all the water rights and all the islands on the United States side of the river; that under the Treaties of 1784, 1789 and 1794 the "Mile Strip" with riparian rights, and the islands were guaranteed to the Seneca; and that agreements for the purchase of part of the strip by the State of New York in 1802 and of the islands in 1815 were in violation of the Indians Non-Intercourse Acts (precursors of 25 U. S. C. § 177).

It was and still is the Seneca's claim that no United States Commissioner was present in 1802 and 1815 when New York State bought out Seneca rights in the southern half of the mile strip and the islands respectively. There appears to be no dispute about the fact that this is true as far as the 1815 transaction was concerned (N. Y. Assem. Doc. No. 51, 1889, pp. 211-213)*.

Part of the intake works for the project and a section of the water conduits are being built in the part of the mile strip covered by the 1802 agreement. Part of the intake is being built on Connors Island which was covered by the 1815 agreement. The main power house and other project works are being built in the northern section of the mile strip, which is also claimed by the Seneca.**

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* In amended petitions to the Indian Claims Commission the Seneca allege that no Commissioner was present at the treaty between the State of New York and the Seneca held on August 20, 1802 (Indian Claims Commission, Docket No. 342-B, Para. 22 Docket No. 342-C, Para. 22).

** New York never bought out any Indian rights with respect to the Northern half of the mile strip on the theory that these rights had been given up by various treaties, beginning with the Treaty of April, 1764.

When the Seneca's representative testified in 1951, both the Senate and House Committees had pending before them bills providing for development of the Niagara River by the Power Authority (S. 1963, H. R. 5099), by the Federal government (S. 517, H. R. 1642), and by private companies (S. 2021, H. R. 3146). Neither Committee issued a report during that term of Congress, but at the hearings individual members of each Committee made it plain that ownership of the land by the Indians would not deter Congress from passing legislation for the project. Some members advised the Indians that the Courts would protect their rights and others suggested that they seek relief for wrongs done them in the past from other committees of Congress (Senate Hearings, *supra*, pp. 187-188; House Hearings, *supra*, pp. 166, 167, 168).

One member of the House Committee said:

> "Mr. ANGELL. I gather from what you are saying that you are interested in protecting the rights of the Indians. I did not hear your testimony.
>
> "I come from Portland, Oreg. We have a large number of reservations, Indian lands, and rights under treaties, particularly on the Columbia River. The way it is handled out there, the Government takes any of their property, which it can do, of course under condemnation. It can condemn the property owned by me or the Indians as far as that goes, but it must compensate the person who owns the property. The Indians have recourse against the Government for its value if their property is taken."

The House Public Works Committee held hearings in June 1956 three weeks after the destruction of the Niagara Mohawk Schoellkopf plant which, under plans prepared up to the time of the hearing, was to continue to utilize about 20,000 cubic feet per second of water available to the United States under the 1950 treaty (R. 282).

The testimony at the hearings indicated that the plan would have to be revised to increase the scope of the project in order to utilize all of the water of the Niagara available to the United States, including about 20,000* cubic feet per second for which Niagara Mohawk had a Federal Power Commission license running to 1971, and had theretofore used at its Schoellkopf plant (R. 280, Item VI, pp. 15, 18).

Testimony was given by a representative of the Corps of Engineers with respect to a plan of development indicated on a map showing a storage reservoir of 30,000 acre feet containing about 1,200 acres, and by a representative of the Power Authority by reference to a model showing a reservoir which was to have a capacity of about 40,000 acre feet and to cover about 1,700 acres.** (The Federal Power Commission's Bureau of Power had prepared a report which showed a reservoir of 22,000 acre feet occupying an area of 850 acres.) (R. 251-257).

A brochure (Exh. 218, E. R. 131-151) addressed to the Members of the House of Representatives on July 25, 1957 after the bill which became Public Law 85-159 had been reported out by the Public Works Committees of both Houses but before it was passed in either, was sent to all members of the House and Senate. The files of the House Public Works Committee still contain a copy of it (R. 386-387). The document was concerned chiefly with power marketing, but a table inside its front cover showed that the project reservoir would have a capacity of 60,000 acre feet.

The reports of both committees recommending passage of Public Law 85-159 referred to the fact that the project

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* Niagara Mohawk had a temporary revocable license for some additional water, some of which it used at Schoellkopf and most of which it used at its low head Adams plant.

** This witness testified that the Authority could condemn all land needed for the project regardless of who owned it (R. 257-261).

would contain a storage reservoir* and indicated the concern of Congress that the project be built as quickly as possible so that cheap power would be available to relieve the emergency caused by the Schoellkopf disaster (Items II, p. 2 and III, pp. 3, 8, 9, 10).

Both reports showed that the project as planned by the Power Authority would have an installed capacity of 2,190,000 kilowatts of which 1,800,000 would constitute firm power on a 17-hour-a-day basis. They specifically stated that "pump-storage and pumping-generating facilities will be required" in order to achieve sufficient firm capacity.

A definite representation was made in the Senate by Senator Javits that the project would have a firm capacity of 1,800,000 kilowatts on a 17-hour firm basis. (Cong. Rec. Vol. 104, Part 130, p. 14,444, 85th Cong. 1st Sess.)

The Federal Power Commission Examiner said, at the conclusion of the hearing on remand (R. 387-388):

> "In the report of the Senate Public Works Committee on S. 2406 (Senate Report No. 539, dated June 27, 1957, first session of the 85th Congress, page 6, it was said:
>
> '. . . there is no controversy as to the most desirable engineering plan of development. Studies and plans for the project have been made by [among others] the Power Authority of the State of New York. The latter organization having made the more recent studies which have taken into account the loss of capacity caused by the collapse in 1956 of the Schoellkopf station.'

* The House report mentioned a reservoir of 22,000 acre feet covering 850 acres of land but specifically stated that it was a part of an old plan prepared before the Schoellkopf disaster. It stated that the project would have to be enlarged. The extent to which the reservoir had to be enlarged was of course brought to the attention of the Congress through Exh. 191 (R. 383-385, 387-388 F. R. 35) and Exh. 218 (F. R. 131). The House Report and Exh. 218 taken together showed clearly that since the new reservoir was about three times as big as the old it would require at least 2500 acres of land.

"These 'more recent' studies are reflected by exhibits introduced in this hearing which show that the reservoir proposed by these plans envisioned the taking of Tuscarora Indian lands even though not specifically so stated".

VII

Necessity of Tuscarora Land for Niagara Project

In passing The Niagara Redevelopment Act Congress mandated that a Niagara Project be built capable of utilizing all the water of the Niagara River available by international agreement and that power be produced as cheaply as practicable. As shown *supra* (pp. 33-40), it understood in passing the legislation that the project would have a dependable firm capacity of 1,800,000 kilowatts on a 17-hour basis, and it specifically understood that in order to have that much capacity a 60,000 acre foot reservoir was necessary.

That Act required the Commission to include in the Niagara license conditions required and deemed necessary under the Federal Power Act. The first condition listed in the Act is contained in § 10 (a) and requires that the project be built in such a way as to be best adapted to a comprehensive plan for development of the river.

The Commission on February 2, 1959 found that "a pump storage reservoir with usable storage capacity of 60,000 acre feet is required to utilize all of the United States' share of the water of the Niagara River made available by international agreement, a requirement expressly imposed by Congress in the Act of August 21, 1957, Public Law 85-159," and that a smaller reservoir would "result in a plan not best adapted to the comprehensive development of the Niagara River for power and other purposes" (R. 487-489).

In effect, the Commission has found that the condition prescribed in § 10 (a) of the Federal Power Act cannot be complied with unless the reservoir has a capacity of 60,000 acre feet.

The evidence shows that a 60,000 acre foot reservoir together with the roads and transmission lines which must necessarily be built around it requires approximately 3,000 acres of land (Exh. 189, E. R. 31).

Because of topography, community disruption, and engineering factors it would not be practical or feasible to build such a reservoir without using Tuscarora land. The uncontradicted evidence in the record shows this.

The general location of the reservoir is limited by geography because it must be on land of approximately 620 feet in elevation and must be near the Niagara escarpment but not actually on it (R. 33, 109). It is limited by the engineering necessity for a sufficient surge basin between the main power plant and the pumping-generating plant (R. 35). It is limited by the present location of the main line tracks of the New York Central Railroad which it would be utterly impractical to move (R. 26, 239-240).

If alternative land were attempted to be used, delay in construction of the project and in production of badly needed power would amount to two or three years (R. 150, 241, 487). Serious community disruption including, among many things the moving of approximately 450 homes as against some 37 on the Tuscarora land would result (R. 49-51, 72, 75, 101-103, 108-110, 123-124, 130-131, 140-148, 150-151, 208-222, 238-239, 487; Exh. 189, E. R. 31). Building the reservoir on the only alternative site possible from an engineering standpoint would increase construction costs about $20,000,000, thus increasing the cost of power since construction cost is the controlling factor in determining the cost at which power is to be sold (R. 37, 39-40, Exh. 66, O. R. 4304). Because of topography it would be necessary to take 1,721 acres to replace 1,383 acres of Tuscarora land (R. 105).

The use of alternate land is not feasible and if Tuscarora land is not available for the Niagara project the capacity of the reservoir will have to be reduced (R. 283-285). With a reduced reservoir the project would not comply with the mandate and understanding of Congress. With a reduced reservoir the project could not utilize all of the United States share of the water, because there are periods when the flow of the river is so high that the turbines and generators would not be capable of utilizing all of it and part of the water would go waste. The firm capacity of the project would be reduced below the 1,800,000 kilowatt capacity contemplated by Congress. This would result in an increase in the price at which power could be sold and be contrary to the Congressional mandate in the 1957 Act that power shall be sold to preference customers "at the lowest rates reasonably possible" and that low power costs shall be restored to industries formerly served by the Schoellkopf plant "as nearly as possible." (R. 225-229, Exh. 13 E. R. 1)*

The Commission found that an attempt to use alternate land in place of Tuscarora land in order to avoid reducing the size of the reservoir would delay construction, cause severe community disruption, divide the town of Lewiston in two, require rerouting "at unreasonable expense" of main highways and railroad tracks, disrupt schools, sewage, water supply, fire protection, civilian defense and require the removal of approximately 450 homes and two cemeteries and the destruction of a new school costing more than one million dollars (R. 487).

The inescapable conclusion is that Tuscarora land is absolutely essential to a comprehensive development using all of the available water of the Niagara River as mandated by Congress.

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* The importance of cost was discussed several times in Committee reports and in the debates. See e.g., Item II, pp. 3, 8, 9, 10; Item III, pp. 2, 7; 104 Cong. Rec. 13195, 14438, 14445. "The cost of public projects is a relevant element in all of them." *United States ex rel. Tennessee Valley Authority* v. *Welsh*, 327 U. S. 546, 554 (1946).

SUMMARY OF ARGUMENT

The judgment appealed from approved the license issued to petitioner for the Niagara Power Project "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes" and directed the Federal Power Commission to amend its licensing order "so as to exclude specifically the power" of petitioner to condemn respondent's land on the ground stated therein that the Commission had failed to make a finding pursuant to § 4(e) of the Federal Power Act that the license would not interfere or be inconsistent with the purpose for which the Tuscarora reservation was created or acquired.

Such a finding is required only when the Commission's authority to issue a license is derived from § 4(e) of the Federal Power Act and when the license covers land which constitutes a reservation as defined in §§ 4(e) and 3(2). By definition such a reservation must be (i) part of the public lands and reservations of the United States, (ii) part of lands or interests in lands owned by the United States and not eligible for private appropriation under Federal law, (iii) part of a reservation which "falls" under the "supervision" of some Department of the United States Government and (iv) "tribal lands embraced within an Indian reservation". Respondent's land does not constitute such a reservation because it does not meet any one of those four requirements, and the doctrine of federal guardianship of Indians does not make it such a reservation. In addition, § 10(e) of the Federal Power Act, which provides compensation to the United States when such a reservation is made subject to a license and § 24 which authorizes the Commission by administrative action to put a licensee in possession of such a reservation, show that lands in which the United States has no property interest but which are owned in fee by others cannot possibly constitute a reservation within the meaning of § 4(e).

Even if respondent's land were a reservation within the meaning of § 4(e), the holding of the court below was wrong because it frustrates the direction of Congress that the project be capable of using all water available to the United States. Petitioner's license was not issued under the authority conferred by § 4(e) but was issued pursuant to the express directive contained in the 1957 Niagara Redevelopment Act. The requirement of § 4(e) that the Commission make a finding in the case of reservations of the United States is merely a limitation of the Commission's power to issue licenses with respect to such reservations when its power to so do comes from § 4(e). Since that power was not used, the limitation upon it was of no significance.

The only purpose of § 4(e) is to authorize the Commission to issue licenses for water power development (i) on streams over which Congress has jurisdiction to regulate commerce, (ii) upon the "public lands and reservations of the United States" and (iii) in connection with surplus water from government dams. By the 1957 Niagara Redevelopment Act Congress superseded § 4(e) with respect to the Commission's power to issue a license for the Niagara and specifically directed the Commission to issue a license to petitioner for a project capable of utilizing all the Niagara water available to the United States. In passing the 1957 legislation Congress put no limitation on the Commission's power to issue a Niagara license. It did, however, direct the Commission to include among the licensing conditions those deemed necessary and required under the terms of the Federal Power Act and those prescribed in the 1957 Act itself. The 1957 Act imposed no limitation or condition with respect to the taking of property for the project and on the contrary clearly authorized the Commission to include in the project any land necessary to use all the Niagara water, including respondent's land. The legislative history of the 1957 Act makes this clear. The requirement in § 4(e) of the Federal Power Act that the Commission make findings when it licenses reservations of the

United States being a mere limitation on the Commission's power to issue licenses on such reservations under the authority of that section is not one of the conditions "required under the terms of the Federal Power Act" which the 1957 Act requires to be placed in a license.

3. Tuscarora land is necessary for the Niagara Project because without it (i) the mandate of the 1957 Act that the project be capable of utilizing all the Niagara water available to the United States cannot be obeyed; and (ii) compliance cannot be made with the requirement of § 10(a) of the Federal Power Act that the license issue upon the condition that the project will be best adapted to a comprehensive plan for improving or developing the Niagara River. Therefore, the holding of the Second Circuit Court of Appeals that the 1957 Act constituted Congressional consent to the taking of respondent's land and that petitioner had a right to take that land under § 21 of the Federal Power Act which authorizes a licensee to condemn any land necessary for a project is correct and the holding of the court below is wrong.

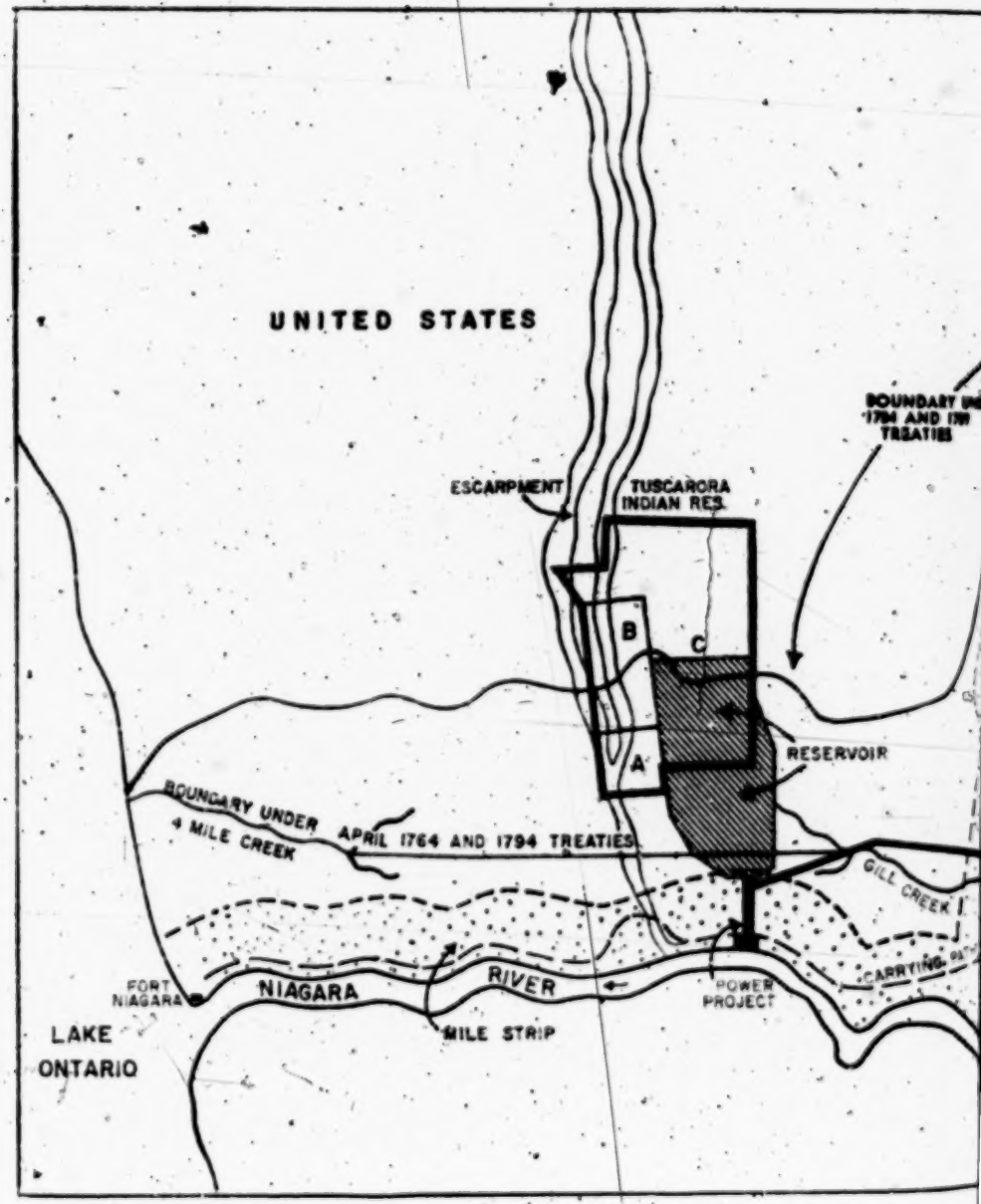
The Federal Power Commission had authority to include within the land covered by the Niagara license any land which the licensee has a legal right to acquire by any principle of law. Petitioner had a right to acquire respondent's land because of the Congressional consent granted in the 1957 Act and the Federal Power Act. In addition, the State of New York on petitioner's behalf had a right to acquire that land for a public purpose in the same way as it has been acquiring Indian land within its borders since the Revolution because no Federal treaty or statute bars its doing so and Congress has therefore tacitly consented.

4. Respondent by choice brought two separate and parallel proceedings testing petitioner's right to acquire its land. It brought an action for an injunction and declaratory judgment in a District Court of the Second Circuit at a time when it could have brought a review proceeding in either the Second Circuit or the District of Columbia Cir-

cuit. It later brought a review proceeding in the District of Columbia Circuit. However it continued to prosecute the prior action. The result was that judgment was actually entered against it in the District Court before the District of Columbia Court obtained jurisdiction of the review proceeding under § 313(b) of the Federal Power Act through the filing by the Federal Power Commission of the transcript of the record. If the Second Circuit Court of Appeals —to which respondent appealed—instead of entering a judgment declaring petitioner had a right to take respondent's land had entered a judgment in favor of respondent, both petitioner and the Federal Power Commission would have been bound. But in any case, respondent should not be allowed to re-litigate the same issues on the basis of the same arguments in a second court of the United States.

An actual controversy having existed with respect to petitioner's right to acquire respondent's land, the courts of the Second Circuit had jurisdiction under Sections 1331 and 2201 of Title 28 of the United States Code to determine every issue involved. Even though the court below acquired exclusive jurisdiction upon the filing of the transcript of the record by the Commission "to affirm, modify or set aside" the Commission's licensing order it was bound by the judgment in the Second Circuit action to the extent of every litigable issue which was common to that action and the review proceeding.

5. The judgment appealed from was wrong on the merits; it was wrong because it was contrary to a prior binding judgment on the same issues; it was wrong because the order of the Commission which was the subject of the Court's review did not aggrieve the party which brought the proceeding; and it was wrong because it constituted a usurpation of congressional power and administrative functions.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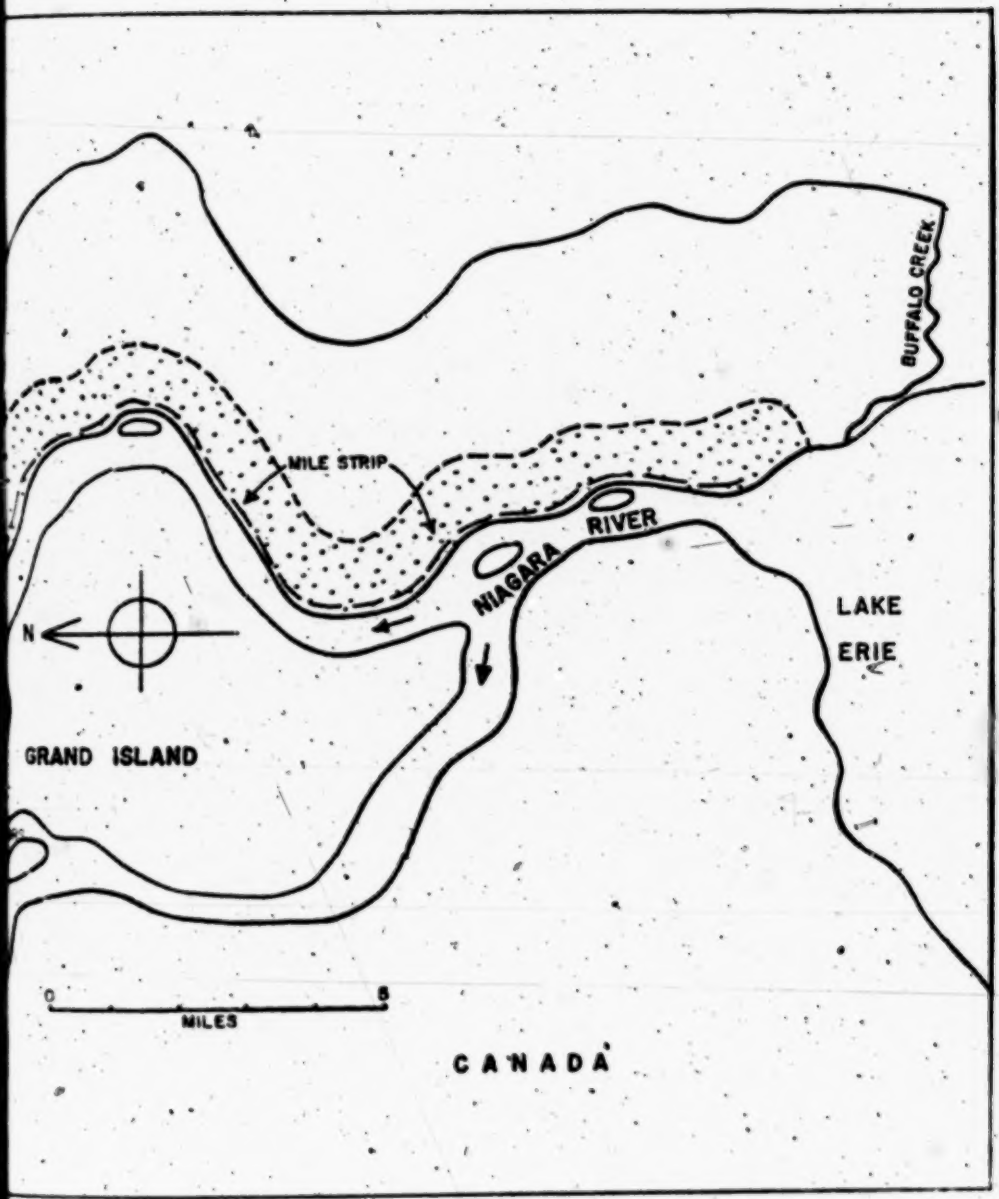
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POINT I

The Court below erred in holding that a finding under § 4(e) of the Federal Power Act was required, because land of respondent needed for the project is not part of a reservation within the meaning of that section.

By its terms the order and judgment appealed from approves the license issued to petitioner "except insofar as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes" and directs the Federal Power Commission "to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." This peremptory direction to the Commission was based on the ground—as stated in the judgment—that the Commission had failed to make the finding which is required by the limitation on its power to issue licenses under § 4(e) of the Federal Power Act upon any part of the public lands and reservations of the United States, *i.e.* that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired.

As we show in Point II *infra*, the finding was not necessary because petitioner's license was issued pursuant to the direction of Congress in the 1957 Niagara Redevelopment Act and not under the authority granted the Commission by § 4(e) of the Act. However, since the judgment appealed from is by its terms based on the premise that respondent's land needed for the project is part of a "reservation" within the meaning of § 4(e) we shall first demonstrate that the premise is false and thus that the judgment must be reversed for that reason.

By § 4(e) Congress in the exercise of its power under the Commerce Clause (Art. I, Sec. 8) authorized the Commission to issue licenses for power development on water over which it has jurisdiction to regulate commerce

and in the exercise of its power under the Property Clause (Art. IV, Sec. 3) authorized the Commission to issue licenses for water power development upon the "public lands and reservations of the United States" and in connection with surplus water from government dams. *Federal Power Commission* v. *Oregon*, 349 U. S. 435, 443-444 (1955).

With respect to its grant of authority to issue licenses upon "reservations of the United States" Congress imposed the following limitation:

> "That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

"Public lands and reservations of the United States" are further defined in § 3(1) and (2) of the Act, to wit:

> "(1) 'public lands' means such lands and interest in lands ***owned by the United States as are subject to private appropriation*** and disposal under public land laws. It shall not include "reservations", as hereinafter defined;
>
> (2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands and interests in lands ***owned by the United States, and withdrawn, reserved, or withheld from private appropriation*** and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks."

Webster's International Dictionary defines "reservation" as

> "*a tract of the public land reserved* for some special use, as for schools, for forests, for the use of Indians,

etc. U. S." (2nd Ed. p. 2118; see also Black's Law Dictionary, 3d Ed. p. 1592; American College Dictionary, 1st Ed. p. 1031; *cf.* opinion below R. 429-430).

A

The Tuscarora land needed for the project is not part of the public lands and reservations of the United States.

The word "rese vation" as used in the proviso of § 4(e) immediately following the authorization to issue licenses on "public lands and reservations of the United States" obviously has the same meaning in the proviso as it has a few lines above. This means, of course, that a reservation to which the proviso applies must be "a part of the public lands and reservations *of the United States.*"

There is no question but that the "public lands and reservations of the United States" referred to in § 4(e) are public lands and reservations belonging to the United States. This would be true even if the term were not clearly defined in that fashion in §§ 3(1) and 3(2) and even if the term did not have that meaning throughout Federal statutes, including other sections of the Federal Power Act and several sections of the Public Lands Law (e.g. 43 U. S. C. §§ 148, 191, 203, 961).

In enacting § 4(e) Congress exercised its power under the commerce clause to deal with interstate commerce and foreign commerce and its power under the property clause to deal with the property of the United States. Had it chosen, it could also have exercised its power under the commerce clause in connection with commerce with Indians. However, it did not do so.

The suggestion of the court below in its memorandum opinion that Congress intended even in cases where licenses are issued under its power over interstate and foreign commerce that a § 4(e) finding be required in connection with Indian land not owned by the United States is not compatible with the plain language of § 4(e) and other sections of the Federal Power Act.

Section 23(b) bears this out. That section also uses the term "public lands and reservations of the United States." It does so in a manner which makes it clear that the terms refer only to property owned by the United States. It requires a person, state or municipality to obtain a Federal Power Commission license under § 4(e) as a condition precedent to building a power project in connection with water over which Congress has jurisdiction because of its power to regulate commerce among the states and with foreign nations and similarly requires such a license if public lands and reservations of the United States are affected. Section 23(b) affirmatively states that if the Commission finds that interstate or foreign commerce is not affected, and if no public lands or reservations are affected, the project may be built upon compliance with state laws.* The section contains no requirement for a license on the basis that the project will affect commerce with Indians.**

The term public lands and reservations of the United States, of course, has the same meaning in § 23(b) as it has in § 4(e). In both cases its definition depends upon §§ 3(1) and 3(2). Section 23(b) makes it clear that it is intended to deal only with waters involved in interstate and foreign commerce and property owned by the United States.

There are several million acres of public lands in New York State which are owned by the State of New York and constitute the forest preserve. They are reserved from private appropriation and use by the State Constitution. Certainly no one would argue that they constitute public

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* The Commission found that the project would affect the navigable waters of the United States (R. 400) but not the public lands and reservations of the United States, since respondent's land does not constitute such a reservation (R. 413).

** Sections 3(8) and 4(g) also make it plain that in enacting Part I of the Federal Power Act Congress intended to exercise its power under the commerce clause only to the extent that interstate and foreign commerce, as distinguished from commerce with Indians, is concerned.

lands or reservations of the United States within the meaning of § 4(e).

It follows that reservations of the United States, like public lands of the United States, are part of the Federal public domain. They are withdrawn from that domain and expressly reserved by the United States for some purpose. This is clear from a reading of the Public Lands Law where the phrases public lands and reservations of the United States are used many times and always in contexts which apply only to lands definitely owned by the United States.

For instance, 43 U. S. C. § 961 (66 Stat. 95) authorizes "the head of the department having jurisdiction over the lands" to grant rights of way for power purposes "upon the public lands and reservations of the United States." That section has a proviso that the right of way may be granted "through any Indian or other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest." The section applies only to Federal public lands and Federal reservations and has never been applied to New York Indian Reservations.* (See Point III, *infra.*)

The United States has no proprietary interest in the Tuscarora land needed for the power project. That land does not pass the test of being part of the "public lands and reservations of the United States."

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* In *United States v. Oklahoma Gas & Electric Co.*, 318 U. S. 206 (1943) the court held that the phrase "reservations of the United States" in this section did not include "lands allotted to Indians in which the United States holds title in trust only to prevent improvident alienation." In the case of allotted lands the United States holds title in trust for the Indians for a period of years. However, in making the allotment it has already given up its beneficial property interest in the land.

B

The Tuscarora land needed for the project is not part of "lands and interests in lands owned by the United States" and the doctrine of United States guardianship over Indians does not make it such.

Section 3(2) of the Federal Power Act provides:

> "(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands and interests in lands *owned by the United States* and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws * * *." (Emphasis supplied.)

The definition of the word "reservations" as including "national forests, tribal lands embraced within Indian reservations, and military reservations" is limited by the phrase "and *other* lands and interests in lands owned by the United States." The intentional use of the word "other" indicates that the items preceding it are governed by the requirement of being "lands or interests in lands owned by the United States." The subdivision cannot be read in such a way as to exclude the requirement that to be a reservation land must be owned by the United States unless the word "other" is ignored completely.

The Court below concluded that even conceding the words "owned by the United States" in § 3(2) are a limitation on the terms preceding them, nevertheless "this reservation is one in which the United States has an interest" (R. 429). Although it found this interest principally in the doctrine of guardianship of the United States over Indians, it stated that "the money derived from the sale in North Carolina was handled by the United States on behalf of the Indians and was applied by the United States to the acquisition of this land" (R. 429-430).

As we point out at pages 22-24, *supra*, the part which Secretary of War Dearborn and his assistants took in the

transaction at the request of the Tuscarora did not give the United States a property interest of any kind in the land. Dearborn acted chiefly as an individual as is evidenced by the fact that when he took title to the land he executed a purchase money mortgage to the seller and when he deeded the land to the Tuscarora he gave them his personal warranty (Exh. 232-U, E. R. 197, 200). The money involved never went into the Treasury of the United States, but upon receipt from the North Carolina purchasers was turned immediately over to the Holland Land Company (R. 304-305, 310-311, 336, 340).

The Court below found that the relationship between the United States and members of Indian tribes, which "resembles that of guardian and ward", gave the United States "an interest" in respondent's reservation, sufficient to override the plain language of §§ 4(e) and 3(2) of the Act (R. 430-431).

That holding was wrong because:

(1) The purpose of guardianship over Indians is to enable the United States to protect Indians against private persons, not to protect Indians against the United States.

(2) The cases cited by the Court below show only that the United States has an *interest in litigation* involving Indian lands and a right to participate in such litigation. They have no bearing on the government's interest or lack of interest in the land itself.

(3) Guardianship over Indians has never been held to prevent the exercise of the United States' conceded power of eminent domain over Indian land, nor of a state's power of eminent domain (see Point III, *infra*).

In support of its thesis that "guardianship" gives the United States an interest in the Tuscarora land within the meaning of § 3(2), the Court below cited *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417 (4th Cir. 1938) (R. 430). There the reservation was actually established by legislative

action on the part of the United States and the United States actually owned title to it and passed statutes specifically giving the Secretary of Interior supervision over it.

In that case the land involved had been condemned and there was no issue as to whether it was subject to condemnation. The only issue was whether the award should be paid to the United States as trustee for the Cherokee or to a utility company which claimed title under a later conveyance from the same grantor as the United States and also by adverse possession under state law. The Court found that *title to the land* was in the United States rather than the utility company.

The court did not base its decision on any principle of guardianship but rather upon the fact that the United States had acquired the earlier *legal title* which could not be divested under the state adverse possession statute. The Federal government had affirmatively taken over supervision and protection of these Indians to the extent of taking title to their land as trustee pursuant to specific authorization of Congress (43 Stat. 376), while the state had traditionally exercised no control over these lands.*

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*The United States had from 1868 affirmatively protected the interests of the Eastern Cherokee "not only with respect to the acquisition and preservation of the title to this land, but also in practically every other way imaginable," supervised their contracts, built schools, provided medical care and furnished food and clothing. Congress appropriated money for the support of the Eastern Cherokee (9 Stat. 254), enacted legislation recognizing their status as a tribe and specifically providing for their supervision by the Department of Interior (15 Stat. 228), specifically authorized a suit to recover their land after judgment had been executed against their agent (16 Stat. 362), appropriated money to pay the judgment creditor (18 Stat. 447), appropriated funds to defend a second action against their land (26 Stat. 338, 357), to settle the litigation (28 Stat. 424, 441) and to redeem the land when it had been sold for taxes (27 Stat. 348). The State of North Carolina on the other hand had done virtually nothing for the Cherokee and would not even let them attend its schools (97 F. 2d 420-421).

The Court below also referred to *United States* v. *Candelaria*, 271 U. S. 432 (1925) and *United States* v. *Sandoval*, 231 U. S. 28 (1913). These cases were part of a line of cases dealing with the Pueblo Indians of New Mexico which affirmed the proposition that the United States exercises wardship over them and has a right or duty to participate in litigation involving them or their lands. None of the Pueblo cases involved in any way the exercise of eminent domain over Indian lands by the United States or by a state.* In each case specific Federal statutes applied and mandated the Federal Government to control or supervise transactions involving the Indians.

Each time that a court held that Federal law did not apply or did not require the Federal Government's intervention as to Pueblo Indians, Congress specifically provided that in the future the Federal Government should intervene. In 1924 Congress specifically provided that no conveyance of land by any Pueblo Indian shall be of any validity unless first approved by the Secretary of Interior (43 Stat.

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*The *Candelaria* case involved a dispute between white men and Indians with respect to ownership of land. This Court held that in order for the United States, as guardian for the Indians, to be bound by a judgment in a suit to quiet title to the land it must either be a party or be represented. At the time this Court rendered its decision it was not clear to it whether or not the United States had in some fashion been represented. In a sequel to the case (*United States* v. *Candelaria*, 16 F. 2d 559 (8th Cir., 1926)) it was determined that a lawyer authorized by the Federal Government to represent the Indians and paid by the Government had appeared on their behalf in the action to quiet title. Therefore it was held the judgment in that action was binding and valid. The most recent of the line of Pueblo cases was *Alonzo* v. *United States*, 249 F. 2d 189, *cert. den.* 355 U. S. 940; *sc.* U. S. D. C. N. M. Civil No. 3407—1958 (unreported) in which individual Indians sought unsuccessfully to eject the Pueblo's lessee from part of the same land which was involved in the *Candelaria* case, which the Pueblo had occupied at least since 1769 (16 F. 2d 559), in which their title had been confirmed by Act of Congress (12 Stat. 71; 15 Stat. 342) and which was specifically made inalienable without the consent of the Secretary of Interior by the Pueblo Lands Act (43 Stat. 636).

636). Cf. *United States* v. *Joseph*, 94 U. S. 614 (1876)*; *United States* v. *Lucero*, 1 N. M. 422 (1869); *United States* v. *Santisteven*, 1 N. M. 583 (1874); *Territory* v. *Delinquent Taxpayers*, 12 N. M. 139, 76 Pac. 307 (1904); *United States* v. *Mares*, 14 N. M. 1, 88 Pac. 1128 (1907) and Act of May 29, 1872, 17 Stat. 165; Act of Jan. 30, 1897, 29 Stat. 506; Act of March 3, 1905, 33 Stat. 1048, 1069; Act of June 20, 1910, 36 Stat. 557.**

The *Candelaria* line of cases is no authority for the novel principle stated by the court below that the United States *ipso facto* acquires an interest in Indian land within the meaning of § 3(2) of the Act because of any relation of guardian and ward.

In the Tuscarora case the United States has no property interest whatsoever in the land—the only kind of interest which could be owned by the United States—and the mere fact that the United States has traditionally treated Indians as wards does not give it the property interest required by §§ 3(2) and 4(e). Neither the wardship principle nor the fact that § 177 applies to Tuscarora land

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* In the *Joseph* case this Court compared the Pueblo Indians with the New York Indians and held that a statute forbidding entry upon Indian land, which is now 25 U. S. C. 180 and which was originally passed in 1793 as part of the statute from which Section 177 is derived, did not apply either to the Pueblo Indians or New York Indians.

** The history of the dealings of Congress with New York Indians is completely opposite to the history of its dealings with the Pueblo Indians. Each time a court made a finding limiting New York's right to legislate with respect to Indians Congress has passed legislation confirming its right. (See unreported cases declaring Seneca leases invalid, discussed in a resolution of the New York legislature memorializing Congress to enact validating legislation (N. Y. Laws, 1875, p. 819) which led to the Acts of February 19, 1875 (18 Stat. 330) and September 30, 1890 (26 Stat. 558); *People ex rel Cusick* v. *Daly*, 212 N. Y. 183, 105 N. E. 1048 (1914), overruled by the Act of July 2, 1948 (25 U. S. C. § 232, 62 Stat. 1224); and *United States* v. *Forness*, 125 F. 2d 928 (2d Cir. 1942) which led to the Act of September 13, 1950 (25 U. S. C. § 233, 64 Stat. 845)).

requires giving the words of §§ 3(2) and 4(e) a meaning other than the plain meaning obviously intended by Congress.

Sections 3(1) and 3(2) were undoubtedly enacted to apply to the vast areas of land in the west where the Federal Government owned the underlying fee subject to Indian right of occupancy just as New York State owned similar land after the Revolution. The United States opened up parts of this land to private appropriation and exploitation and reserved other parts of it for other uses, including use by Indians.*

The statutory definitions in §§ 3(1) and 3(2) must be accepted. As Justice Cardozo said: "There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves". *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96 (1935).

C

The land here involved is not tribal land embraced within an Indian reservation.

Section 3(2), by including in the definition of the word reservations, "tribal lands embraced within Indian reservations" obviously was intended to distinguish between different types of land within Indian reservations. What Congress undoubtedly had in mind in enacting that part of the definition were Indian reservations established by treaty, executive order or Act of Congress out of the Federal public domain and subject to Federal allotment under 25 U. S. C. § 331 (24 Stat. 388). The Secretary of Interior, of course, has supervision over such reservations.

* There are vast areas of tribal lands embraced within Indian reservations which are owned by the United States and which have been withdrawn, reserved or withheld (either by statute, treaty or executive order) from private appropriation and disposal under the public lands laws (U. S. Dept. of Interior, *Federal Indian Law*, 1958 Revision p. 32).

The land within such reservations which is not allotted is held in common by the tribe and is "tribal land embraced within an Indian reservation." The United States owns the underlying fee, subject to Indian right of occupancy which the United States can eliminate even when it is protected by treaty. *Cherokee Nation* v. *Southern Kansas Railway Co.* 135 U. S. 641 (1890). If licensed under § 4(e) an annual charge is collected by the United States under § 10(e) and credited to the tribe's account with the government under § 17.*

Those parts of such a reservation which have been allotted are no longer held in common by the tribe and are, therefore, not tribal lands. While the United States holds legal title as trustee for a period of years under 25 U. S. C. § 348 (24 Stat. 389, 31 Stat. 1085), the individual allottee owns the beneficial interest. Such allotted land can be condemned by a state or municipality for any public purpose under 25 U. S. C. § 357 (31 Stat. 1084) and the compensation goes to the allottee. It may also be condemned by any licensee of the Federal Power Commission under § 21 of the Federal Power Act. Otherwise such allotted land would not be available for a power project to a licensee which is not a state or municipality.

Section 3(2) makes it clear that allotted land is not part of the public lands and reservations of the United States which § 4(e) authorizes the commission to license under the property clause. It is not tribal land embraced within an Indian reservation for which § 10(e) provides a method of fixing compensation by way of rental charges.

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* Compare 25 U. S. C. § 399 (41 Stat. 31, 1231) under which the Secretary of Interior is authorized to lease Indian land in certain western states "withdrawn prior to June 30, 1919 from entry under the mining laws". Rents received are deposited in the treasury to the credit of the Indians "subject to appropriation by Congress for their benefit, unless otherwise provided by treaty or agreement ratified by Congress". (See also 25 U. S. C. §§ 398, 400, 400a, 401; 43 Stat. 244, 42 Stat. 857, 44 Stat. 300, 43 Stat. 111).

Indian land which is subject to allotment by the United States but has *not* been allotted is the type of *tribal* land embraced within an Indian reservation to which § 4(e) and the finding proviso of that section are intended to apply. Such unallotted land is property of the United States with respect to which Congress may authorize use for power projects—even when interstate or foreign commerce is not involved—and for which the United States is entitled to charge a rental as provided in § 10(e).

The Tuscarora land needed for the Niagara project is not tribal land as contemplated by § 3(2). It is true that record title to the land is in the Tuscarora Nation, but except for 45 acres it is not held in common by the tribe. The main property interests are in the individual allottees whose rights have been recognized by the courts for generations (Statement, pp. 25-28).

The bulk of the Tuscarora Reservation has been allotted under § 95 of the New York Indian Law which authorized such allotment of "tribal land" (Statement, p. 26). Section 98 makes illegal a sale of trees "on any of the tribal lands" without consent of the chiefs. In *Tuscarora Nation of Indians* v. *Williams*, 79 Misc. 445, 141 N. Y. S. 207 (1913) the Court held that an individual Indian who sold trees from land which he treated as his allotment was not guilty under that section on the ground that once allotted it was no longer tribal land.

The meaning of tribal lands in this New York statute is similar to the meaning of tribal lands in § 3(2) of the Federal Power Act.

Allotted land in the Tuscarora Reservation is tribal only in the limited sense that the Nation retains an interest because allotted property can under some circumstances revert to it. (Compare *Terrance* v. *Gray*, 171 App. Div. (N. Y.) 11, 156 N. Y. S. 916 (1916)). It is not tribal in the sense contemplated by § 3(2).

None of the members of the Tuscarora Nation earns his living from the whole reservation or from that part still

possessed by the tribe. The Tuscarora are not a tribal society. They are not nomadic. They are not herdsmen or professional hunters. They earn their living by farming, or by working outside the Reservation. Actually, only a few are still farmers and most of those who are are only part-time farmers. The bulk of them work on construction work or in factories in the industrial area adjoining the Reservation. They live in houses like other people. Their situation is the same as that of their white neighbors except that they have such advantages as tax exemption, being judgment-proof as far as their land is concerned, having free medical care provided by the State for those who want it, and having their children educated solely at the expense of the State (Statement pp. 24, 28-32).

Less then 50% of the people living on the Tuscarora Reservation are members of the tribe (Exh. 210 E. R. 73-110).

On the basis of the record as it now stands, it is clear that the Court below operated on a false premise when it said in its memorandum opinion that the Tuscarora land "is indubitably 'tribal lands embraced within Indian reservations' within the usual meaning of that phrase." (R. 429)

D

Respondent's land does not fall under the supervision of any department of the United States Government.

The limitation in § 4(e) requires that licenses issued within any reservation after a finding by the Commission shall be "subject to and contain such conditions as the Secretary of the department under whose *supervision* such reservation *falls* shall deem necessary for the adequate protection and utilization of such reservation".

There is no question whatever but that the primary power which Congress has under the *commerce* clause to deal with Indians authorizes it to pass whatever legislation it sees fit controlling dealings with Indians and establish-

ing supervision over their reservations. As we have shown in the statement, pp. 30-32, *supra*, no Federal legislation has been enacted giving any department of the United States government supervision over the Tuscarora Reservation.

Throughout its history the Federal Government has done nothing for the inhabitants of the Tuscarora Reservation. Its only dealing with the reservation involved the enforcement of the Seven Major Crimes Act until the passage in 1949 of 25 U. S. C. 232 (62 Stat. 1224) put all crimes committed on the reservation under state jurisdiction. On the other hand the State has educated the children on the reservation, has provided medical services and welfare services and has built roads and bridges all without Federal help. (Statement, pp. 30-32).

The Committee on Interior and Insular Affairs, House of Representatives, following an investigation of the Bureau of Indian Affairs, reported:

> "In the State of New York there are no services being rendered by the Bureau [of Indian Affairs] at the present time except for the annual payment of $6,000 and interest and the distribution of $4,500 worth of cloth to the various tribes. . . ." (H. Rep. No. 2503, 82d Cong., 2d Sess., p. 36).

As Chief Hill of the Tuscarora testified (R. 197) the 2½ yards of bleached muslin for each member of the Tribe is "all we get" from the Federal Government.

The Federal Government has not even had an Indian agent in New York since 1949 (*supra*, p.32).

The Tuscarora Reservation is unlike the reservations in the west created by the United States Government by treaty, executive order, or statute where supervision is established pursuant to Title 25 of the U. S. Code (e.g. §§ 25, 33; 38 Stat. 598, id. 80) and unlike the North Carolina reservation involved in *United States* v. *7405.3 Acres of Land*, *supra* where the reservation not only was established by the United States Government but where federal statutes man-

dated the Department of Interior to exercise supervision. (Act of July 27, 1868, 15 Stat. 228; Act of June 4, 1924, 43 Stat. 376). It is also unlike the Pueblo which was the subject of litigation in *United States* v. *Sandoval, United States* v. *Candelaria* and *United States* v. *Alonzo* which a Federal statute specifically placed under the jurisdiction of the Department of Interior (Pueblo Lands Act, 43 Stat. 636).

The court below in its memorandum opinion evidently took the position that § 177 of Title 25, by forbidding alienation of Tuscarora land without federal consent, in effect put the reservation under the supervision of some department of the United States Government. If that is so, the department involved is the Department of Justice and not the Department of Interior. As Assistant Attorney General Van Devanter ruled in 1900, the Department of Interior has no authority to consent to the alienation of Tuscarora land (Exh. 250 E. R. 234-238). In 1912 and 1921 the Department of Interior reaffirmed this view and in 1921 suggested that it was the duty of the United States Attorney for the Western District of New York to see to it that the land was not leased by individual Indians (Exh. 238 E. R. 215-216, Exhs. 251-253 E. R. 239-241). This was his duty because 25 U. S. C. § 175 (27 Stat. 631) directs the United States Attorney to represent Indians in suits at law or in equity.*

However, the type of obligation which the Department of Justice may have to prevent alienation of Tuscarora land certainly does not constitute supervision within the meaning of § 4(e). That section refers to property in which the United States has a proprietary interest and over which some department of the government exercises affirmative control and supervision. Obviously the statute does not intend that the Department of Justice should be charged with

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* Section 11 of the New York Indian Law requires District Attorneys to protect Indian rights to their land. In 1958, Chapter 190 of the laws of that year allowed the council, chiefs or headmen to bring an ejectment action, although the District Attorney still may do so.

imposing conditions necessary for the protection and utilization of the Tuscarora Reservation.

Chapter 12 of Title 25 authorizes the Secretary of Interior to approve many types of leases of land within Indian reservations which are subject to the allotment laws and thus have been established by the United States through treaty, Act of Congress or Executive Order. United States officials have consistently ruled over the years that these statutes do not apply to the Tuscarora Reservation. (Letter Opinion May 4, 1900, Exh. 250 E. R. 234; *id.* June 13, 1912, Exh. 238 E. R. 215; *id.* June 6, 1921, Exh. 251 E. R. 239). These officials took the position that if there was any Federal jurisdiction involved it was the jurisdiction of the Department of Justice to prevent white men from making leases banned by 25 U. S. C. § 177, 4 Stat. 730 (Exh. 251 E. R. 239).*

* The only New York reservations where leases have been authorized by the Federal Government are the Allegheny and Cattaraugus reservations of the Seneca. These reservations were established pursuant to a combination of the 1794 Treaty of Canandaigua and the 1797 "Treaty of Big Tree", which was really an agreement between the Seneca and Robert Morris on behalf of the Holland Land Company, but was made under the supervision of a Commissioner of the United States. Because there was doubt as to the validity of leases made by the Seneca of land within their reservations upon which railroads and even cities had been built, Congress at the State's request (N. Y. Laws of 1875, p. 819) in 1875 and in 1890 enacted statutes (18 Stat. 330; 26 Stat. 558) validating prior leases and authorizing future leases. Under the 1875 and 1890 statutes the leases were enforceable in the State Courts. (Act of Feb. 19, 1875, § 7). Despite this in 1942 the United States Court of Appeals for the Second Circuit in *United States* v. *Forness*, 125 F. 2d 928, held that a state statute with respect to tender before judgment was not binding on the Seneca in an action to collect rents under a lease. To offset that decision § 233 of Title 25 (64 Stat. 845) was enacted in 1950 making it clear that those leases were to be administered in the State courts under State law. This statute was drawn by State officials and enacted by Congress at the request of the State for the purpose of eliminating the confusion caused by the Forness decision. (Reports of N. Y. Joint Leg. Com. on Indian Affairs, 1948, 1949, 1950, 1951.)

Chapter 8 of Title 25 of the United States Code contains many provisions delegating to the Secretary of Interior authority to arrange rights of way for public purposes through Indian reservations. Section 323 (62 Stat. 17) authorizes him to grant rights of way "for all purposes".* But none of these provisions has ever been held to apply to New York State reservations.

In the absence of Federal statutes allowing the leasing of land within the Indian reservations (other than the Alleghany and Cattaraugus reservations) New York has enacted statutes authorizing such leasing and setting up safeguards in connection with several reservations. (It has not enacted any statute with respect to the Tuscarora Reservation.) Thus a lease for quarrying purposes in the Tonowanda Reservation was sustained in *United States* v. *National Gypsum Co.*, 141 F. 2d 859 (2d Cir. 1944) on the theory that Congress intended to allow New York State law to prevail in connection with that reservation. In that case the Court said:

> ". . . It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U. S. C. A. § 177, R. S. § 2116. . . ." (p. 863)

The Tuscarora Reservation does not pass the test of being a reservation which falls under the supervision of any department of the United States Government and this is an additional reason why it is not the type of reservation contemplated by § 4(e) of the Federal Power Act.

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* It is significant that § 326 of Title 25 (62 Stat. 18) provides that Section 323 and related sections "shall not in any manner amend or repeal the provisions of" various sections of the Federal Power Act, including Section 21 which authorizes condemnation of land needed for power projects.

E

An examination of the Federal Power Act as a whole and particularly of §§ 10(e) and 24 demonstrates that Tuscarora land cannot possibly constitute a reservation within the meaning of §§ 3(2) and 4(e).

An examination of § 10(e) of the Federal Power Act demonstrates conclusively that the tribal lands embraced within Indian reservations referred to in § 3(2) are those which are the property of the United States. Section 3 in its very preamble states that the words defined in the section shall have the same meaning wherever used in the Act. It is clear therefore that the "tribal lands embraced within Indian reservations" which constitute "reservations" under § 3(2) are the same "tribal lands embraced within Indian reservations" referred to in § 10(e).

Section 10(e) provides "That the licensee shall pay *to the United States* reasonable annual charges in an amount to be fixed by the Commission . . . for recompensing *it* for the use, occupancy and enjoyment of *its* lands or other property. . . ." The section goes on to establish procedures for fixing annual charges for the use of various types of government property including "tribal lands embraced within Indian reservations". It provides for the waiver of charges when property is licensed for use by states or municipalities to the extent that they sell power to the public without profit or use it for state or municipal purposes, and in the case of projects constructed by them primarily to provide or improve navigation there is no charge under any circumstances. These waivers of charges apply even in the case of Indian reservations.* The section

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* The Power Authority is a municipality as defined in § 3(7) of the Federal Power Act. (New York Public Authorities Law § 1002). It sells all its power without profit. About half the power is distributed to the public by municipal systems, rural cooperatives and private utilities. The Authority's contracts with them provide they will not make a profit although they are allowed a fair return on distribution facilities. The remainder of the power is sold by the Power Authority directly to consumers without profit. (FPC Order of Aug. 3, 1959).

goes on to provide for a waiver of charges in projects of less than 100 h.p., no matter by whom built, which produce or distribute power for domestic, mining or other beneficial purposes except in the case of "tribal lands within Indian reservations". See also § 10(i).

Section 17 provides that charges received in connection with "any Indian reservations shall be placed to the credit of the Indians on such reservation".

Section 10(e) makes it clear that where licenses are issued for the use of "lands and other property" of the United States, including Indian reservations, compensation takes the form of the payment of an annual charge to the United States for their use. They are not condemned under § 21, in which case title would pass and compensation would consist of payment of the value of the property taken. Counsel for the Tuscarora agrees that § 10(e) and not § 21 would apply if their land were licensed under the first proviso of § 4(e), and so stated on the record before the Commission (O. R. 7714).*

Section 4(e) of the Federal Power Act contemplates the licensing of projects with respect to two types of land: First, public lands of the United States and reservations of the United States; and second, non-federal lands, *i.e.*, lands not owned by the United States and in which it has no property interest.**

The Act deals with each type of land differently. *Non-federal* lands are to be acquired by a licensee by contract or

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* The Court below seems to have completely overlooked the significance of § 10(e). It evidently took the position that if the Commission made a § 4(e) finding with respect to respondent's land, it would be acting under power delegated to it by Congress under the Commerce Clause—not the Property Clause—and that the land could be condemned pursuant to § 21.

** There is a third type of project not here pertinent, *i.e.*, use of surplus water or water power from a Government dam. Compensation for use of "dams and other *structures* owned by the United States" is an annual rental governed by § 10(e).

exercise of the United States' power of eminent domain under § 21. The right of a licensee to use *federal* land if included by the Commission in an approved licensed project, is derived immediately from the license. There is no need of condemnation, since the United States already owns the land. The licensee, however, may be required to pay compensation for the use, occupancy, and enjoyment of land of the United States under § 10(e).

Obviously the only property of which the United States can authorize the licensing on an annual charge basis is property owned by the United States. When property is owned by others it may be taken from them for a public purpose but they are entitled to be compensated under the Fifth Amendment and to have the amount of the compensation fixed in a court of competent jurisdiction.

The Tuscarora do not constitute a tribe organized under Section 16 of the Act of June 11, 1934 (25 U. S. C. § 476, 48 Stat. 987; Exh. 216, E. R. 126-127) and hence the provision in § 10(e) that the fixing of charges for Indian reservation land is subject to tribal approval in the case of tribes organized under that Act would not apply to them. Therefore, if their land were covered by §§ 4(e) and 10(e), they would not even be entitled to a voice in the fixing of annual rent.

The government has no right to take land owned by Tuscarora Indians in fee and mandate that it be rented out on an annual basis, and in some cases to waive the annual charge. This would be a denial of due process not only as far as the nation owning the record title is concerned but also as far as individual allottees owning houses on and property interests in the land are concerned. *United States* v. *Creek Nation*, 295 U. S. 103 (1935); *Jones* v. *Meehan*, 175 U. S. 1 (1899).

Assuming, however, that the Commission made a § 4(e) finding that the licensing of the land would not be inconsistent with the purpose for which the reservation was

acquired, its action would at best give the licensee a mere naked license authorizing use of Tuscarora land as far as the Commission is concerned. The Commission would have no authority to put the licensee in possession of the land and there is no statute which provides a method by which the licensee could get possession.

In the case of lands owned by the United States, once a license has been issued under § 4(e) the licensee may enter upon "any lands of the United States included in any proposed project" under the authority of § 24 upon complying with the terms of that section, including putting up a bond to pay for any damages caused to others whose prior rights to use the property are being extinguished. Section 24 beyond any doubt whatever applies only to property owned by the United States. If the government property involved happens to be Indian reservation land, § 24 nevertheless provides a method of obtaining possession for a Federal Power Commission licensee. The Indians have a right to be compensated for the use of the land which is taken from them by the payment of an annual charge under § 10(e) (except in cases where the charges are waived) and under § 24 have a right to be paid for the betterments they have placed on the property. The Indians' right to use lands of the United States can be legally taken from them by the government and transferred to the Federal Power Commission licensee for the duration of the license. *Henkel* v. *United States*, 237 U. S. 43 (1915).

The situation is completely different with respect to land owned by an Indian Nation in fee. The only way such land can be taken is by eminent domain, with all the guarantees of the Fifth Amendment.

Thus the Federal Power Act taken as a whole makes it clear that Tuscarora land is not a reservation within the meaning of § 4(e).

F

Administrative interpretation as evidenced by regulations adopted by the Commission and prior administrative holdings of the Commission and the Interior Department demonstrate that respondent's land is not a reservation within the meaning of § 4(e).

The 1957 Niagara Redevelopment Act directed the Commission to issue petitioner a Niagara license " in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized." The Commission's "Rules of Practice and Procedure" in turn require that applications for licenses conform to the Commission's "Regulations Under the Federal Power Act" (18 C. F. R. 1.5 (b) (3)).

The "Regulations under the Federal Power Act" show that the Commission has consistently interpreted the phrase "reservations of the United States" in § 4(e) as referring only to lands in which the United States has a property interest. They require an applicant for a major license to show:

> (a) "the lands and reservations *of the United States* which will be affected by the project" (18 C. F. R. 4.40 (g));
>
> (b) "full details as to the lands owned by applicant, and as to applicant's plans for acquiring title to or the right to occupancy and use of lands *other than those owned by the applicant or by the United States*, necessary or essential for carrying out the project covered by the application" (18 C. F. R. 4.41 (F));
>
> (c) "state and county lines, *reservations of the United States*, towns, streams . . ." (18 C. F. R. 4.42 (J));
>
> (d) ownership and right of occupancy of lands within the project area including "reservations (indicating separately each reservation) and public lands (*indicating separately lands, full title to which*

remains in the United States and lands in which the United States retains only an interest") 18 C. F. R. § 4.42 (K);

(e) "state, county and town lines and boundaries of *reservations of the United States* (18 C. F. R. 4.42 (f));

(f) "if the project affects unsurveyed public lands or reservations, the protraction of townships and section lines * * * such protractions whenever available to be those recognized by the agency of the United States having jurisdiction over the lands" (18 C. F. R. 4.42 (g)). See also 18 C. F. R. 4.70 (d), 4.82 (R), 11.22.

The forms of application prescribed by the Commission for major license applications (18 C. F. R. 131.2) and for preliminary permits (18 C. F. R. 131.10) both require the following statement:

> "*Lands of the United States* which will be affected are located in: . . . (State whether in public domain, national forests, *Indian reservations*, giving the names of forests or reservations)".

Administrative action in connection with petitioner's application for a Niagara license has uniformly construed respondent's land as not constituting a reservation within the meaning of § 4(e).

During the course of the hearing conducted by the Commission in the fall of 1957 the Department of Interior made an administrative determination that Tuscarora land is not a reservation within the meaning of § 4(e). (Exhs. 212, 215, 217; F. R. 117, 125, 128.)

During the course of the 1957 hearing the staff of the Federal Power Commission took the position that a § 4(e) finding was not necessary.

Counsel for the Tuscarora evidently took the same position because although on November 25, 1957 they filed a petition on behalf of the Tuscarora for leave to intervene in

the license proceeding (which was granted on December 9), and on January 2, 1958, filed a brief with the Commission asking that Tuscarora land be excluded from the project, they made no claim that the finding provision of § 4(e) applied until February 28, 1958 when they petitioned for rehearing with respect to the Commission's January 30th order.

On March 21, 1958 the Commission made an administrative determination as a result of the rehearing application that the Tuscarora's land is not a reservation within the meaning of the finding provision of § 4(e).*

The Court below erred in holding that respondent's land is "tribal lands embraced within Indian reservations". It erred in holding that respondent's land is a "reservation" within the meaning of § 3(2) of the Act. It erred in holding that—because Indians are in some respects wards of the United States—respondent's reservation is "one in which the United States has an interest" such as to bring it within the meaning of § 4(e).

Respondent's land does not come within that meaning because it is not a reservation of the United States, the United States does not own it or have any proprietary interest in it, it was not withdrawn from appropriation under the public land laws (and indeed was never part of the public domain) and it does not fall under the supervision of any department of the United States government.

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* The Court of Appeals for the Second Circuit, both in its July 24, 1958 order declaring that Tuscarora land could be condemned under § 21 of the Federal Power Act and in its August 26, 1958 order denying reargument necessarily determined that the § 4(e) provision did not apply. The argument that § 4(e) did apply was made by counsel for the Tuscarora in their original brief, on oral argument, and as a ground for their petition for rehearing.

POINT II

Even if respondent's land were a reservation within the meaning of § 4(e), the court below erred because (i) its final judgment, in denying petitioner's right to condemn respondent's land, frustrates the mandate of Congress that the project be capable of utilizing all Niagara water and (ii) the Niagara Redevelopment Act precludes the application of the finding clause of § 4(e).

Congress through the Niagara Redevelopment Act mandated the licensing and construction of a project capable of making practical use of all the Niagara water available to the United States. The judgment below frustrates this Congressional mandate because, although it approves the license for a project which includes respondent's land and thus is capable of utilizing all the water, it goes on to deny the licensee the right to condemn that land. In practical effect it makes it impossible to build a project capable of using all the water as directed by Congress.

The reason ascribed by the court below for its action was that a § 4(e) finding has not been made. This was error because the Niagara Redevelopment Act precludes the application of the finding clause even assuming that respondent's land constitutes the type of reservation described in that clause.

The finding clause in § 4(e) is a limitation on the Commission's power to issue licenses on public lands and reservations of the United States in the ordinary case where the Commission's power to issue a license is derived solely from § 4(e) of the Federal Power Act. That limitation is inapplicable where, as here, issuance of a license to a particular licensee for a specified project is made mandatory by special Act of Congress. The 1957 Act in mandating a project able to make full use of the water available gave the Commission all the power it needed to issue the Niagara license thereby

superseding § 4(e) at least to the extent of any conflict between the two Acts.* If the limitation on the Commission's power to issue a license under § 4(e) were to prevent it from issuing a license with respect to land needed for the project such a conflict would result.

As we have shown in the Statement p. 40-42, *supra*, respondent's land is absolutely needed for the Niagara Project if it is to be capable of utilizing all the Niagara water available to the United States. The court below was wrong in its November 14 opinion when it said:

> "It does not appear that the acquisition of Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope".

Evidence put in the record after the court made that statement showed unequivocally that the size of the reservoir and the power capacity of the project will have to be reduced if respondent's land is not available (R. 225-227, 284-285).

As we have also shown in the Statement, p. 7, *supra*, a reservation to the 1950 Treaty (1 U. S. T. 694) forbade the Commission to issue a Niagara license pursuant to § 4(e) by requiring specific Congressional action authorizing the project. The Court of Appeals for the District of Columbia Circuit held that this reservation was ineffective and reinstated petitioner's 1956 application which had been filed under § 4(e) and dismissed by the Commission (*Power Authority* v. *Federal Power Commission*, 247 F. 2d 539). After the Niagara Redevelopment Act was passed this Court vacated that judgment as moot even though a Niagara license which had already been issued to petitioner was based on that application as amended. (*American Public Power Association* v. *Power Authority*, 355 U. S. 64).

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* The 1957 Act by directing the Commission to issue a license to the Power Authority also superseded § 7(a) of the Federal Power Act which directs the Commission in issuing licenses to give certain preferences among applicants and to decide on the relative merits of plans of development proposed by different applicants.

The 1957 Act directed the Commission to issue the license in conformance with the Commission's Rules of Practice and Procedure and prescribed that in case of conflict the Act was to prevail. Nothing in those Rules limited the Commission's power to license the use of Indian reservation land.

The 1957 Act directed the Commission to include in the Niagara license the conditions required by the 1957 Act and also those required and deemed necessary under the Federal Power Act.

The conditions prescribed in the 1957 Act itself had to do with power marketing and placed no limitation on the Commission's authority to license the use of any land needed for the project.

The conditions prescribed in the Federal Power Act are contained in § 10 and the most important is the one in § 10(a) which requires "that the project adopted, including the maps, plans, and specifications shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing" the waterway. On February 2, 1959 the Commission without dissent stated that if the project does not include sufficient land to provide a 60,000 acre foot reservoir compliance with that condition cannot be had (R. 486-494).

Like the conditions prescribed in the 1957 Act itself, none of the conditions required by the Federal Power Act places any limitation on the Commission's authority to license any land needed for the project.

It is clear that Congress by the 1957 Act made the finding proviso of § 4(e) inoperative with respect to the Niagara Project, and that the judgment of the court below frustrates the mandate of Congress.

POINT III

The Court below erred in directing the Commission to amend the license to exclude specifically the power of the Authority to condemn respondent's land since Congress has consented to the exercise of such power and no treaty or statute forbids it.

The Authority's power to condemn land—including Indian land—needed for the Niagara Project is not something which the Commission can grant or take away. Since the power of condemnation is not found in the license, such power cannot be excluded from the license.

Assuming that the court below in ordering such exclusion meant that the Commission should add to the license an affirmative provision denying to the Authority the right to condemn (as distinguished from the right to purchase) respondent's land which is covered by the license which the court approved, this directive was nevertheless wrong since statutes give the Authority the right to condemn the land, Congress has consented to its doing so and no treaty or statute forbids it.

The Court of Appeals for the Second Circuit found Congressional consent to the condemnation of respondent's land in the Niagara Redevelopment Act and held that such condemnation could be accomplished under Section 21 of the Federal Power Act. That Court further held that such Congressional consent was properly to be inferred from the size and extent of the project, the legislative history of the 1957 Act and the Act itself. *Tuscarora Nation of Indians v. Power Authority, et al.*, 257 F. 2d 885 (1958), reh. den. 257 F. 2d 895, cert. den. 358 U. S. 841 reh. den. 360 U. S. 923.

In direct contradiction to the prior binding adjudication of the Second Circuit Court of Appeals, the court below held that the Congress had not by the Niagara Redevelop-

ment Act given consent to the use of Tuscarora land for the Niagara project.

The November 14 opinion of the court below shows that its holding that the Niagara Redevelopment Act did not constitute such consent was based on several factual errors.

As we have shown in Point II, the court was wrong when it assumed that Tuscarora land was not necessary for the project.

The court was also wrong when it said (R. 425-426) that Congress was not advised of the possibility that Indian reservation lands might be sought as the site of part of the project. Actually, the Authority's plans to use Tuscarora land were open and notorious at the time of the Senate Public Works Committee 1957 hearings and material submitted showed the reservoir in part on Tuscarora land although ownership of none of the property needed for the project was indicated (Statement, pp. 33-34). In addition, a representative of the Seneca Indians testified before committees of both houses of Congress that the Senecas still owned land which had been reserved to them under the 1794 Treaty of Canandaigua and which was to be the site of the intake works and part of the waterway of the project and a member of the House Committee observed that Indian land could be condemned for the project.* (Statement, pp. 35-37).

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* Land within the Mile Strip and on Connors Island (centerfold map) needed without question for the intake works and waterway was *reserved* to the Seneca by the 1794 Treaty of Canandaigua. New York State brought out the Senecas' right of occupancy to part of that land in 1815 at a treaty at which no federal representative was present (N. Y. Ass. Doc. No. 51, 1889 (211-213)) (Statement, pp. 29, 36). Certainly it could not be reasonably argued that Congress failed to consent that this property which is so obviously vital to the Niagara Project be licensed by the Commission and its use acquired by the licensee without a § 4(e) finding. The principle is the same with respect to the respondent's land needed for the reservoir if the Congressional mandate for utilization of the water is to be obeyed.

The Court below in its November 14 opinion said:

> "Senator Chavez, Chairman of the Committee in charge of the bill, told the Senate: 'No dams or provisions for storage of water are necessary.' This testimony related to the project as planned prior to the Schoellkopf disaster, but we are not advised that the impression given was ever withdrawn or changed."

The reports of both the House and Senate Public Works Committees talked about the need of a storage reservoir and it is clear that what Senator Chavez meant was that there was not to be a reservoir created by damming a river. The Great Lakes constitute a natural reservoir but a provision of the 1950 treaty with Canada makes a pump storage reservoir absolutely essential (Sen. Rep. No. 539, 85th Cong. 1st Sess. p. 5; H. Reps. No. 862, 85th Cong. 1st Sess. p. 6, Statement, p. 6).*

The court below showed a complete misunderstanding of the facts when it said that Congress did not intend "to save costs to its sole licensee . . . at the expense of Indians living on an Indian Reservation." There is of course no suggestion in the record that the Tuscarora would not be fairly compensated for any land taken for the project. On the contrary, two members of the Commission described the offers made to them (including an identical amount of land better than that which would be taken) as "an unprecedented opportunity to advance whatever way of life they had been following." (R. 493).** It is true that any condemnation award or settlement with the Tuscarora would be much less expensive than an attempt to use alternate land. The resulting saving to petitioner—a non-profit organization—would

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* See Minority Report by Senators Chavez, Gore and Morse on S. 2599, S. Rep. 2501, 83rd Cong. 1st Sess., p. 24. All proposed projects for Niagara development have included a pump storage reservoir. (*Id.*, p. 5, Statement, p. 3).

** The majority of the Commission said that relocation of the Tuscarora on substitute land represented "an equitable solution", but found this possibility immaterial. (R. 485). Only 37 dwellings would have to be moved (p. 29, *supra*).

accrue to its customers. Such saving would be in accord with the express mandate of Congress that petitioner make power available to domestic and rural consumers "at the lowest rates reasonably possible" and restore low power costs to industry "as nearly as possible." (16 U. S. C. § 836(b)(1) and (3)).

The court below erroneously stated:

> "During the hearings in 1956, on bills relating to the Niagara power project, witnesses represented to the House Committee that the lands to be acquired for the project belonged to the Niagara Mohawk Power Company." (R. 426)

Niagara Mohawk owned only 42% of the land needed for the project (R. 290; Exh. 18, E. R. 11). An Army Engineer did give erroneous testimony before the House Committee on Public Works in 1956 to the effect that Niagara Mohawk Power Corporation "generally" owned all the land needed for a smaller project designed by the Army Engineers before the Schoellkopf disaster. That project was smaller than the Authority's project concerning which testimony was given at the same hearing and evidence was presented at the hearing that even the latter project would have to be enlarged as a result of the Schoellkopf disaster. Even for the smallest of the planned projects, the engineer's testimony was incorrect (R. 289-290; Item I, pp. 2-5).

At the hearing attempts were made through questioning a Power Authority witness to show that Niagara Mohawk in fact owned the property needed for the project. This witness at all times refused to testify that this was so and the transcript of the testimony indicates clearly that the congressmen did not believe it to be so (R. 257-262).

As a matter of fact, the Power Authority's witness testified that there were four different methods by which the Power Authority could acquire land needed for the project. These included the Federal Power Act procedure and three procedures under State law. The witness testified that the

Authority could condemn whatever land was necessary for the project regardless of who owned it (R. 257-258, 261).

The prior determination by the Second Circuit Court of Appeals was clearly correct. The record makes plain that at the time Congress passed the special Act—not only consenting to the project but mandating the issuance of a license for it to the Authority—Congress was aware of the urgent necessity for the pump-storage reservoir as an essential component of the project and had data before it showing the only feasible location of the reservoir to be in part *on Tuscarora land.*

As we have shown in the Statement (pp. 33-42), when Congress passed the 1957 Act it had before it a record which showed that:

(1) a storage reservoir was completely essential if the project were to have a firm capacity of 1,800,000 kilowatts as represented (pp. 33-34);

(2) in order to utilize all the water of the river, about 20,000 c. f. s. of which became available as a result of the Schoellkopf disaster, the size of the storage reservoir would have to be increased so that instead of having a capacity as low as 22,000 acre feet covering 650 acres, it would have to have a capacity of 60,000 acre feet and cover a larger acreage which obviously would amount to about 2,500 acres (pp. 38-39);

(3) the Seneca Indians claimed to own land completely essential for the project (pp. 35-37);

(4) the reservoir would be in close proximity to the City of Niagara Falls but would nevertheless be built in open country (p. 34). (The only open country on which the reservoir could be built includes Tuscarora land (p. 34).);

(5) the reservoir as pictorially shown on documents submitted would take in an area between Upper Mountain Road and Saunders Settlement Road which, in fact, in-

cluded Tuscarora land although the ownership of none of the land needed was indicated (pp. 33-34, 39-40);

(6) the Power Authority considered that it had the right to condemn whatever land was necessary for the project regardless of its ownership, either under the Federal Power Act or under state procedures (p. 38);

(7) the cost of construction of the project was the controlling factor in determining the cost at which power could be produced (p. 41);

(8) the production of cheap power was essential to the survival of existing industry in the Niagara area (p. 34);

(9) the project needed to be built quickly to relieve a serious power shortage in the area which resulted from the Schoellkopf disaster and which had an unfortunate economic effect on the area (pp. 38-39);

(10) the project was a gigantic one and although the Power Authority had developed the most up-to-date plan of development it was desirable to leave to the Federal Power Commission the task of passing on the design and precise location of the project features (p. 34).

The legislative history of the Niagara Redevelopment Act shows clearly that Congress intended that whatever land is necessary for the project be available to it. As we have shown, Tuscarora land is necessary if the project is to be capable of utilizing all the Niagara waters available to the United States as mandated by the 1957 Act and if it is to comply with Section 10(a) of the Federal Power Act.

No reasonable interpretation can be made of the Niagara Redevelopment Act and Section 21 of the Federal Power Act taken together except that Congress authorized the taking of Tuscarora land for the project.

Particularly is this so because under the true rule of construction enunciated by this Court, Indians, like all others, must be deemed included within the scope of a general statute unless explicitly excepted therefrom. *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943); *Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418 (1935); *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S.

575 (1928); *People ex rel. Kennedy* v. *Becker*, 241 U. S. 556 (1916); *Barker* v. *Harvey*, 181 U. S. 481 (1901); *Albany* v. *United States*, 152 F. 2d 266 (6th Cir. 1945); *Bailey, et al.* v. *United States*, 47 F. 2d 702 (9th Cir. 1931); *Y-Ta-Tah-Wah* v. *Rebock, et al.*, 105 Fed. 257 (N. D. Iowa 1900).

The Niagara Redevelopment Act (like the Federal Power Act) is the broadest type of statute in purpose and scope and is directly analogous to the Internal Revenue Code which was held in *Five Civilized Tribes, supra*, to include the land and income of even a restricted Osage Indian within its scope. As this Court held in *Five Civilized Tribes*, where—as here—the language of a general act and the public policy underlying it are broad enough to include them, Indians must be specifically and unequivocally *excluded* to be exempt from its terms and conditions.

Nor does the fact that the finding provision of § 4(e) is inapplicable to the Tuscarora Reservation mean that there is not also consent to the taking of Tuscarora land in the Federal Power Act itself. Sections 3(2), 4(e), 10(e), 17 and 21 taken together are the clearest possible evidence that Congress had in mind the problems of Indians and the guardianship of the United States over them when it passed the Federal Water Power Act. Its silence with respect to those Indians who, like the Tuscarora, do not live on reservations of the United States, or who live on allotted land within such reservations, must be taken as an indication that "they had no claims which called for special protection" (*Barker* v. *Harvey*, 181 U. S. 481, 492-493 (1901)). Under § 21, their lands are accorded the same protection as those of other citizens, and this Congress deemed sufficient (55 Cong. Rec. 1565).

In *Barker* v. *Harvey, supra*, this Court was called upon to consider whether Congress had intended to include Indians within the scope of an act invalidating Mexican grants to lands in California not claimed within two years of the act. It held that the failure of Congress to exclude Indians, commonly known to be residents of the geographic area affected by the act, from the scope of the act evidenced an intent to have them *included* within its scope. In holding

an Indian within the scope of, and barred under, the terms of the act; the Court stated:

> "[A]s no action has been shown in relation to these particular Indians, or their claims to these lands, *it is fairly to be deduced that Congress considered that they had no claims which called for special action.*" (pp. 492-93) (emphasis added)

Congress clearly manifested an intent by the enactment of the Niagara Redevelopment Act as well as by § 21 of the Federal Power Act that whatever land was necessary should be available for the Niagara Project, including Indian land. It therefore authorized the Commission to license such land and consented to its condemnation.

In addition, the State of New York on petitioner's behalf has tacit Congressional consent to acquire that land for a public purpose as it has done with respect to Indian land within its borders since the Revolution because no federal treaty or statute bars its doing so.

The Power Authority is an arm of the State of New York and while the Congress under the commerce clause has undoubted power to forbid New York State from exercising eminent domain over Indian land within its borders it has not done so. On the contrary it has at least tacitly consented to New York's exercise of such power on behalf of itself and its subdivisions. The court below evidently took the position that 25 U. S. C. § 177 and 233 forbid New York's exercise of such power without specific Federal consent.

Prior to this litigation, Section 177 was never held to apply to the exercise of eminent domain over Indian land in New York either by the Federal Government or by the New York State Government.

The following authorities sustain such power in the State: *Wadsworth* v. *Buffalo Hydraulic Assoc.*, 15 Barb. 83 (N. Y. Sup. Ct., Niagara Co., 1853); *O'Meara* v. *Comrs.*, 3 Thomp. & Cook 235, revd. on other grounds in 59 N. Y. 316 (1874); *France* v. *Erie R. Co.*, 5 Thomp. & Cook 12 (1874); *Jemison* v. *Bell Telephone Co.*, 186 N. Y. 493, 79 N. E. 728 (1906); *Button* v. *Snyder*, 7 F. Supp. 597 (W. D. N. Y. 1934); *United States* v. *Cattaraugus County*, 71 F.

Supp. 413 (W. D. N. Y. 1947); *Dixon* v. *State*, 4 Misc. 2d 76, 155 N. Y. S. 2d 723 (1956); *Jones Cut Stone Co.* v. *State*, 7 Misc. 1048, 166 N. Y. S. 2d 742 (1957); Nichols, *Eminent Domain*, § 2.224 (1950).

Indeed, § 177 has never been held even to apply to the purchase of land by New York in its proprietary as distinguished from its sovereign capacity. *U. S.* v. *Franklin County*, 50 F. Supp. 152 (N. D. N. Y. 1943); *St. Regis Tribe* v. *State of New York*, 5 A. D. 2d 117, 168 N. Y. S. 2d 894 (1957) aff'd 5 N. Y. 2d 24 (1958), *cert. denied* 359 U. S. 910, *reh. denied* 359 U. S. 1015 (1959).*

Title to large and important tracts in New York State is held under purchases which New York made in its proprietary capacity at no less than 39 treaties held after the present language of § 177 was adopted with no commissioner of the United States present. N. Y. Assem. Doc. No. 51, 1889, pp. 190-211.

Since the Revolution New York has openly and notoriously condemned Indian land for public purposes without Congressional authorization and Congress has never passed any legislation forbidding it.**

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* The first Indian Non-intercourse Act (1 Stat. 138) adopted in 1790 and by its terms operative for less than three years forbade states to buy out Indian land rights except under Federal auspices. The succeeding statute (1 Stat. 329) adopted in 1793 eliminated that provision and substituted the language of the present § 177 which is derived from it. The provision allowing states to buy Indians' rights if present at a treaty held by the United States has never been held to provide an exclusive means by which the states could make such purchases. § 4 of the 1790 Act and the corresponding section of the 1793 Act are printed as Appendix B to this brief.)

** During the period when the Indian Non-Intercourse Acts were enacted in 1790, 1793, 1802 and 1834 (1 Stat. 138; 1 Stat. 329; 2 Stat. 139; 4 Stat. 729; 25 U. S. C. § 177), the United States was held not to have power of eminent domain (*Pollard's Lessee* v. *Hagan*, 44 U. S. 212 (1845)). Until 1876 when the United States was first held to have that power, *Kohl* v. *United States*, 91 U. S. 367, only the state could condemn Indian land. A 1927 Act of Congress (44 Stat. 932) recognized and treated as valid New York's prior condemnation of part of The Oil Spring Reservation for canal purposes.

In *United States* v. *Cattaraugus County*, *supra*, Federal officials unsuccessfully challenged New York's right to condemn Indian land, and in *United States* v. *Franklin County*, *supra*, unsuccessfully challenged its right to purchase it without Federal consent. In each case they relied on Section 177. The United States did not appeal in either case.

As we have shown (pp. 56, 63, *supra*), 25 U. S. C. § 233 was drafted and sponsored by New York State officials to overcome the confusion caused by the decision in *United States* v. *Forness*, *supra*, in relation to leases on the Seneca Indian land. It was not intended to make any substantive changes in the law, and as the New York Attorney General said it did not add or detract from the State's power of condemnation over Indian land. 1950 Op. Att'y Gen. (N. Y.) 206.*

As the District Court said with respect to 25 U. S. C. § 233 in *Tuscarora Indian Nation* v. *Power Authority*, *supra*:

> "If the Congress had intended to place an absolute restraint on the alienation of Indian lands in New York, or to assert an absolute paramount authority in the Congress over New York Indian lands, it would not have chosen so incongruous and unlikely a time and place to do so. If such a violent departure from the long history of dealing with and treating Indian lands had been intended, the Congress would surely not have done so in so casual and off-handed a manner. The parties have adduced nothing, either by way of legislative history or legal interpretation, to indicate that such was the intent of Congress." (164 F. Supp. 107, 116)

In support of its holding that New York cannot acquire respondent's land on behalf of the Power Authority without

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* While the bill with the alienation proviso in it was pending in Congress, the decision in the *Cattaraugus* case was handed down sustaining the State's right to condemn Indian land and holding that the United States did not need to be a party. Certainly the New York officials who drafted and sponsored the legislation did not believe it would overrule that decision and there was no suggestion from any quarter that it would.

specific federal consent the court below cited *United States* v. *7,405.3 Acres of Land*, 97 F. 2d 417 (4th Cir. 1938); *United States* v. *Candelaria*, 271 U. S. 432 (1926); *United States* v. *Sandoval*, 231 U. S. 28 (1913); Cohen, *Federal Indian Law* 321 (4th ed. 1945); 18 Ops. Att'y. Gen. 235 (1885).

None of those authorities supports that proposition.

As we have shown, pp. 53-54, *supra*, in *United States* v. *7,405.3 Acres of Land*, the Indian land involved, title to which was in the United States, had already been condemned and the question presented was as to who was entitled to damages. There was no controversy concerning the right to condemn the land.

As we have also shown, (pp. 55-56) the *Candelaria* and *Sandoval* cases did not involve condemnation in any way, but did involve the government's right to participate in litigation between private persons and Indians concerning their land and there were specific statutes giving the government such right.

The passage from Cohen and the Attorney General's opinion cited by the court (R. 424) had nothing to do with condemnation.*

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* While the passage cited does not refer to eminent domain, see Cohen said at page 309:

> "Even where the United States does not own the ultimate fee in the land of an Indian reservation, its relation of guardianship to the Indian tribe carries the power and duty of protecting the Indian possessory right against condemnation proceedings or other infringements by the state."

It is significant that Cohen did not cite a single case to sustain this proposition and no case has been found which sustains it. Cohen's statement is repeated word for word in the 1958 revision of the Handbook (U. S. Dept. of Interior, *Federal Indian Law*, (1958) at p. 639) but the new edition not only fails to cite any cases in support of the statement, but omits to cite *United States* v. *Cattaraugus County*, *supra*, which holds to the contrary with respect to New York reservations.

(Footnote continued on next page)

It is clear that whatever Congressional consent was necessary for the taking of Tuscarora land for the Niagara Power Project was provided not only by the Niagara Redevelopment Act and the Federal Power Act but also by the course of dealings between Congress and New York State for 150 years.

In the 1945 edition Cohen also made the statement:

> "While tribal lands are, like other lands, subject to the Federal power of eminent domain, they are not subject to the state power of eminent domain except where Congress has specifically so provided". (p. 310).

To support this statement he cited *United States* v. *Minnesota*, 95 F. 2d 468 (8th Cir. 1938), aff'd *sub nom. Minnesota* v. *United States*, 305 U. S. 382 (1939) and *United States* v. *Colvard*, 89 F. 2d 312 (4th Cir., 1937).

The *Minnesota* case involved condemnation of allotted land by the state pursuant to 25 U. S. C. § 357 (31 Stat. 1084) which authorizes states and municipalities to condemn Indian allotted land for any public purpose. The ultimate decision in the *Minnesota* case was that since the United States was the owner of the fee as trustee for the allottee, it was a necessary party defendant. Cohen neglected to cite the Court of Appeals decision, after remand, granting condemnation and overruling its own prior decision that consent of the Secretary of Interior was necessary. 113 F. 2d 770 (1940).

The *Colvard* case involved the same eastern band of Cherokee Indians which were involved in *United States* v. *7,405.7 Acres of Land*, 97 F. 2d 417 (4th Cir., 1938) cited by the court below in its memorandum opinion. In that case the United States sought an injunction against Colvard from using a right-of-way across Cherokee land for his private purposes which he claimed a right to do under a condemnation proceeding in the state court. The injunction was granted on the ground that the United States was "the holder of the title to the lands in question, was not made a party to the proceedings in the state court, and consequently is not bound by those proceedings had behind its back".

In granting the injunction the court said:

> "A right-of-way could no more be acquired over these lands by proceedings against the Indians than title to lands embraced in a government forest could be tried by suit against the forester, nor than post office property could be condemned for purposes of a street by proceedings against the postmaster." (pp. 314-315).

POINT IV

The court below should not have allowed respondent to relitigate issues already concluded in a prior action brought by respondent in a forum of its choice.

On February 28, 1958 respondent petitioned the Commission for rehearing on its January 30 licensing order and for modification of that order to exclude its lands from the scope of the license. It stated that it was "aggrieved . . . by the mere fact that its property *may* be included in the Niagara Project".

It said that although in the January order the Commission had refused to pass on the Authority's legal right to acquire respondent's land, the issuance of the license might be construed as giving federal consent to the acquisition of its lands in the light of § 21 of the Federal Power Act. Respondent said that the law was unsettled as to whether general legislation like § 21 constitutes authority from the United States. It said there were no decisions on the point.

Respondent also asked exclusion of its land from the license on the ground that no § 4(e) finding had been made.

On March 18, 1958 respondent moved the Commission for a stay pending decision on the application for rehearing because petitioner had obtained an order from a State court for the taking of depositions of officers of the tribe as to the names and interests of individual allottees preparatory to starting a condemnation action.

On March 21 the Commission denied the application for rehearing and held that (i) the question of whether petitioner was empowered to acquire respondent's land by eminent domain was one to be resolved by a court of competent jurisdiction; (ii) respondent's lands are not part of a reservation within the meaning of § 4(e) of the Federal Power Act; (iii) respondent's land constituted the best location for the storage reservoir. It dismissed the applica-

tion for a stay pending decision on the rehearing application saying it had not had time to consider the stay application before it actually made the decision on the rehearing.

At that point respondent was in a position where it could apply for court review of the January 30 order any time within 60 days.

Immediately after the Commission's denial of the rehearing application, petitioner started a condemnation action in a state court and respondent moved to dismiss it. On April 11, and before argument on the motion, a state statute was enacted allowing petitioner to acquire land for the Niagara Project by the appropriation method of eminent domain as it had on the St. Lawrence and petitioner discontinued the condemnation action and on April 15 took steps to acquire respondent's land by the appropriation method.

On April 19, respondent, which had not yet sought review of the January 30 order, brought an injunction and declaratory judgment action in a United States District Court of the Second Circuit and obtained a stay of the appropriation proceeding. It asked for a judgment declaring that petitioner "has no right, authority or power to acquire by appropriation or otherwise" any land belonging to respondent.

In its complaint respondent alleged that the action was brought under 28 U. S. C. §§ 2201 and 2202 and that:

> "An actual controversy exists between plaintiff and defendants, which is definite, concrete, real and substantial, which involves and affects the legal relations of plaintiff and defendants, and vitally affects the public interest. Further, said actual controversy admits of an immediate and definitive determination of the legal rights of the parties, and of the public interest and admits of specific relief through a decree of conclusiveness as appears at length from the following".

25 U. S. C. § 2201 provides that in the case of an actual controversy within its jurisdiction, except with respect to

federal taxes, a United States court may declare the rights and other legal relations of the parties whether or not further relief is or could be sought. Rule 57 of the Federal Rules of Civil Procedure provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief and also provides that the court may order a speedy hearing.* Respondent not only alleged in its complaint that the court had jurisdiction and power to grant the relief sought, but submitted a memorandum to the District Court to sustain that proposition.

Respondent did not commence a review proceeding until May 16, nearly a month after it had brought the declaratory judgment action and after 56 of the 60 days allowed by law for filing a petition for review had expired. Instead of bringing the proceeding in the Second Circuit where its declaratory judgment action was pending it brought it in the court below and there contended as in the Second Circuit action that petitioner "lacks power to acquire" respondent's land "without specific permission from Congress, which permission has not been requested or granted."

Respondent sought review only of the January 30 order of the Commission and did not seek review of the May 5 order approving Exhibit J to the license which for the first time affirmatively included respondent's land within the licensed project area (Statement, pp. 10, 12). In fact, respondent did not even seek rehearing on that order although by its terms it was to become final in 30 days unless rehearing was requested.

* The Authority was able to obtain speedy hearings in both the District Court and the Second Circuit Court of Appeals in the declaratory judgment action. Conversely, respondent was able to delay the review proceedings so that even an interlocutory decision was not obtained with respect to the January 30 order until November 14, although against respondent's opposition the court advanced the schedule.

On June 24, the day before the court below acquired jurisdiction* in the review proceeding through the Commission's filing of the transcript of the record with it, the District Court for the Western District of New York rendered judgment dismissing the injunction and declaratory judgment action on the merits thus overruling the respondent's contentions that petitioner had no right to acquire its land. The District Court dismissed the stay previously granted.

Respondent did not seek a stay in the District of Columbia Circuit but did obtain a stay from the Second Circuit Court of Appeals and prosecuted there an appeal from the District Court judgment.

On July 24 the Second Circuit Court of Appeals entered a declaratory judgment to the effect that Congress through the Niagara Redevelopment Act consented to the use of respondent's land for the Niagara Project and that petitioner has the right to condemn it under § 21 of the Federal Power Act. By this judgment and by its denial of rehearing on August 26 that court necessarily overruled respondent's contention that a § 4(e) finding was necessary. In denying rehearing the court also overruled the contention —then made for the first time—that only the District of Columbia Circuit could decide the question of petitioner's right to take respondent's land located in the Second Circuit.

It was against this background and after this Court denied certiorari to the Second Circuit, that the court below made its November 14 holdings on the basis of contentions which the Second Circuit had rejected.

The court below erred by failing to give recognition to the prior judgment of the Second Circuit Court of Appeals

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*The Court had not theretofore acquired any jurisdiction. This is made clear by the Amendment of § 313(b) of the Federal Power Act by the Act of August 28, 1958 (Public Law 85-791). Since that amendment a court in which a petition to review a Federal Power Commission order is filed obtains jurisdiction upon filing the petition and obtains exclusive jurisdiction when the Commission files with it a transcript of the record.

with respect to questions common to the litigation in both courts. In directing the Commission to amend its licensing order so as to "*exclude specifically the power* * * *to condemn*" respondent's lands it flatly contradicted the prior judgment of the Second Circuit Court that petitioner "as a licensee of the Federal Power Commission directed to issue a license pursuant to Public Law 85-159 is *authorized to exercise the right of eminent domain* according to the procedures specified in Section 814 [§ 21] of the Federal Power Act." *Tuscarora Indian Nation v. Power Authority*, 257 F. 2d 885, 894.

Unless the principle that there should somewhere be an end to litigation and that there should be finality of judgment is discarded, a court which obtains "exclusive jurisdiction to affirm, modify or set aside" an administrative order should nevertheless respect and be bound by prior adjudications of a sister court of competent jurisdiction with respect to issues, the resolution of which is necessary to determine whether or not to affirm, modify or set aside the order.

As this Court said in *Angel v. Bullington*, 330 U. S. 183, 192-193:

> "The doctrine of res adjudicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion".

In this case the court which entertained the declaratory judgment action had undoubted jurisdiction under all the circumstances to determine whether or not Congressional consent was required for the condemnation by the Power Authority of respondent's land, and if so whether such consent had been granted and if granted whether a § 4(e) finding was necessary to make it effective.

These issues were decided and judgment entered with respect to them prior to the time the court below obtained

jurisdiction in the review proceeding by the Commission's filing of its transcript.* The mere filing of the transcript certainly did not vacate the judgment already entered and oust the Court of Appeals for the Second Circuit of jurisdiction to review the judgment on appeal.

The Second Circuit Courts did not purport to decide directly the validity of petitioner's license and of course were not called upon to do so. However they passed upon every objection which respondent made in the review proceeding to petitioner's taking its land. If respondent had been successful in the Second Circuit litigation it would have achieved precisely what it sought in the review proceeding. The Second Circuit Courts having had jurisdiction, respondent is bound by their determinations.

The court below was not thereby prevented from passing on the validity of the license pursuant to § 313(b), but in doing so should have recognized the binding effect of the Second Circuit judgment with respect to matters already litigated. *Embry* v. *Palmer*, 107 U. S. 3, 12-13; *George H. Lee Company* v. *Federal Trade Commission*, 113 F. 2d 583.

If the Court of Appeals for the Second Circuit had held that petitioner could not acquire respondent's land, the Commission although not a party would have been bound if for no other reason because it could not issue a license for the project under the 1957 Act except to petitioner. Even if the Commission had not been bound by the Second Circuit

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* As a matter of fact since the Commission in its January 30 and March 21 orders did not actually include any of respondent's land within the project area as licensed there is serious doubt that respondent was aggrieved by any order of the Commission prior to May 5. Even if the court below was correct in holding that the May 5 order related back to January 30 and that upon the making of the May 5 order the January 30 order aggrieved respondent (and the court therefore was able to review it) the fact remains that respondent under that theory was not aggrieved by the January 30 order when it brought the declaratory judgment action in April. If it was not then aggrieved bringing the declaratory judgment and injunction action was the only Federal remedy then available to it.

judgment, respondent would have been precluded from relitigating the same issues in a second forum. It would have gained nothing by finding a new opponent. *Bruszewski* v. *United States*, 181 F. 2d 419 (3rd Cir. 1950); *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116 (1956); *Coca Cola* v. *Pepsi-Cola Co.*, 6 W. W. Harr. (36 Del.) 124, 172 A. 260 (1934).

The presence of an additional party in the review proceedings did not put respondent in a position to relitigate issues already concluded in the Second Circuit. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940); *Montezuma Canal Co.* v. *Smithville Canal Co.*, 218 U. S. 371; *Green* v. *Bogue*, 158 U. S. 478; *National Circle, Daughters of Isabella* v. *National Order of Daughters of Isabella*, 270 Fed. 723, *cert. den.* 255 U. S. 571; *Tauziede, et al.* v. *Jumel*, 133 N. Y. 614.

The facts here are precisely the opposite of those in *Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320. There after the Court of Appeals in a review proceeding had affirmed the Commission's order and in doing so held (against the contentions of the state which was a party to the proceeding) that specific state property could be taken for the project by the licensee through the exercise of the Federal power of eminent domain delegated to it by Congress under the Federal Power Act, a state court entered a judgment expressly contradicting the prior judgment of the Court of Appeals and in effect nullified the Commission's licensing order.

The doctrine of the *Tacoma* case that the court in which a license review proceeding is brought has upon *actual* review of the licensing order exclusive jurisdiction to decide "all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms" thereby precluding "*de novo* litigation between the parties of all issues inhering in the controversy" should not be extended to the extent of permitting the court on review to decide *de novo* issues presented in

the review proceeding which were previously determined by a court of competent jurisdiction in an action brought by the same party which brought the review proceeding.

Neither should it be extended to the extent of holding that a licensee's right to condemn land for a power project can be contested only in a review proceeding. Such a holding would lead to absurd results.

Landowners are not personally notified of licensing proceedings which may affect their property. Section 4.31 of the Commission's Regulations provides in connection with license applications "that notices will be given in accordance with the requirement of § 4 of the Act." Sections 4(e) and 4(f) of the Federal Power Act require the Commission to publish notice of a license application in a newspaper published in the county or counties in which lands affected by the project are located. The notice is not required to describe specifically lands affected by the project. Of course, one reading the notice would have a right to look at the application and exhibits on file with the Commission. However, the Commission's rules merely require the application to include "a project area map with such information with respect to such lands affected as *is readily available without a detailed survey.*" (18 C. F. R. § 4.31). Under the rules the boundaries of the project are not finally determined until it is virtually completed (18 C. F. R. § 4.41(F)). In addition, land which is not included within the project area (and its use therefor not licensed by the Commission) often has to be condemned, *e.g.*, for spoil banks, relocation of railroads, highways, houses and other structures.

In any event, the chances of a property owner's obtaining actual notice that his land is to be affected from a legal notice are not good. Therefore, if the licensee's right to take land could be contested only in a licensing proceeding, the owner would often be precluded by a final determination

therein before he discovered that his land was to be taken for project purposes.*

In our case, as stated on p. 33, *supra*, it was an open and notorious fact that petitioner required Tuscarora land for the power project. It had actually been negotiating with the Tuscarora for a long time prior to the Commission's holding hearings on the license. The United States government refused to represent the Tuscarora in the license proceeding (E. R. 117) but the Nation nevertheless intervened and thus became eligible under § 313(b) to bring a review proceeding. If a review proceeding were held to be an exclusive method of testing a licensee's right to take land for a power project and if respondent had not intervened, the result would be completely unconscionable, for respondent would never have had its day in court.

POINT V

The final order and judgment of the court below is a usurpation of Congressional and administrative authority.

In its final order and judgment the court below approved the license "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes." It then went on to direct the Commission to amend the license by adding to it an affirmative provision "to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes".

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*While no personal notice is required to be given property owners actual notice that an application has been filed is required to be given to states and "state commissions" affected and where public lands are involved to the Department of the Interior. (18 C. F. R. §§ 4.31, 4.37).

The court did not give any direction with respect to condemning their land for roads, transmission lines or other project purposes. As we have shown in the Statement, pp. 13-14, *supra*, 86.5 acres of land were vitally needed for transmission lines which have been constructed and are in operation.

The court approved a license including Tuscarora land even for reservoir purposes but denied petitioner's right to acquire use of that land for that purpose by condemnation. The result is that under the court's order petitioner has a duty to build a reservoir on Tuscarora land but as a practical matter since the Power Authority cannot purchase the land, it has been put in a position where it is unable to comply with the license.

The court had no power to direct the Commission to amend the license for the purpose of denying petitioner the power of condemnation of land included in the license. The power to condemn land needed for a licensed project is granted to a licensee by Congress through § 21 of the Power Act. It is not a power to be granted or denied by the Commission.

The court's order is a usurpation of administrative as well as congressional authority in that it ties the hands of the Commission to the extent that the Commission cannot take further steps which in its judgment may be necessary as a result of the court's holding that the licensee cannot condemn respondent's land. *Federal Power Commission v. Idaho Power Company*, 344 U. S. 17. In the *Idaho* case the Court of Appeals attempted to strike a provision from an order of the Commission and as thus modified, to affirm it. Here the court attempted to add a negative provision to the license and as thus modified, to approve it. The statute gives the Court power to affirm, modify or set aside the licensing order. It does not give the Commission the power

to make the administrative decision of approving the license. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930).

Conclusion

The judgment under review should be reversed and the court below directed to dismiss the petition for review or affirm the order of the Commission under review.

Respectfully submitted,

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October 16, 1959

APPENDIX A

The Niagara Redevelopment Act, Public Law 85-159, Act of August 21, 1957, 16 U. S. C. §§ 836, 836a, provides in pertinent part:

"§ 836. Authorization to license construction and operation; licensing conditions

"The Federal Power Commission is expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

"(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

"(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

• • •

"(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission

project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: . . ."

"§ 836a. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized."

Sections 3(1) and 3(2) of the Federal Power Act (49 Stat. 838, 16 U. S. C. § 796 (1) (2)) provide as follows:

"SEC. 3. The words defined in this section shall have the following meanings for the purposes of this Act, to wit:

"(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined;

"(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;"

Section 4(e) of the Federal Power Act (49 Stat. 838, 16 U. S. C. § 797(e)) provides as follows:

"SEC. 4. The Commission is hereby authorized and empowered—

. . . . .

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto; except that this provision shall not apply to any Government dam con-

structed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

Sections 10(a) and 10(e) of the Federal Power Act (49 Stat. 838, 16 U. S. C. § 803(a)(e)) provide as follows:

"Sec. 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States, or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures

in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge, and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period."

Section 21 of the Federal Power Act (49 Stat. 838, 16 U. S. C. § 814) provides as follows:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the Commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of

interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000." [41 Stat. 1074; 16 U. S. C. 814]

Section 177 of Title 25 of the United States Code (R. S. 2116) provides as follows:

"§ 177. *Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

Section 233 of Title 25 of the United States Code (64 Stat. 845) provides as follows:

"§ 233. Jurisdiction of New York State courts in civil actions

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil

actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, that nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

APPENDIX B

Section 4 of the Indian Non-Intercourse Act of July 22, 1790 (1 Stat. 138) provided:

> "No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of preemption to such lands or not*, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." (emphasis added)

Section 8 of the Indian Non-Intercourse Act of March 1, 1793 (1 Stat. 330) provided:

> "Sec. 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negociating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treaty with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty."